



American Bar Association Journal

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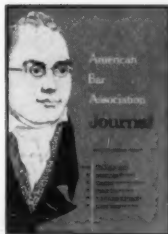
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This Month's Cover

Our cover this month depicts Joseph Story, Associate Justice of the United States Supreme Court and one of America's greatest legal scholars. Appointed to the Court in 1811 at the age of 32, Story was the youngest member of the Court in history and his service was one of the longest, thirty-three years. His famous *Commentaries* were written during a twelve-year period when he was a member of the Court as well as Dane Professor of Law at Harvard. The line sketch of Story was drawn by Charles W. Moser, of Chicago.

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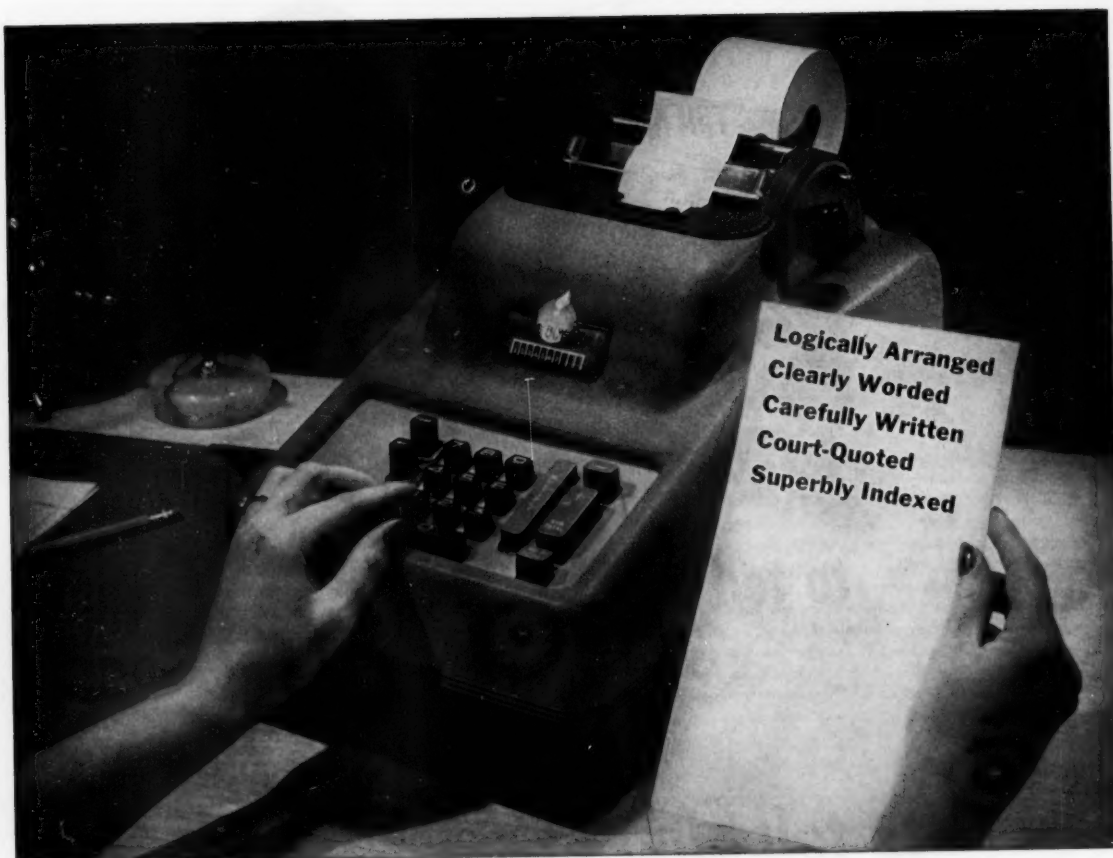
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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law, International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon

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Disturbed Over Legal Process in Segregation Decisions

■ Having been born and reared in Minnesota, I grew up in an atmosphere free of racial restrictions and am in accord with the state policies of non-segregation which prevailed in the schools and colleges that I attended in the Middle West, though I have never felt that I should force my opinions on Southerners who have a different viewpoint and possibly a different experience. However, as a lawyer, I cannot but be concerned over the legal process by which desegregation has been arrived at by the Supreme Court in the state and federal segregation cases decided in May, 1954.

The classic precedent commonly referred to on racial segregation is *Plessy v. Ferguson*, 163 U. S. 537 (1896), sustaining state legislation which compulsorily required separate but equal accommodations in railway coaches. It is not generally remembered that as late as 1927 in *Gong Lum v. Rice*, 275 U.S. 78, the Supreme Court, then composed of Chief Justice Taft and Justices Holmes, Brandeis, Stone, Van Devanter, McReynolds, Sutherland, Butler, and Sanford, *unanimously* decided, citing many cases, that racial segregation in the schools was "a question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution". In the *Gong Lum* case, as shown in the briefs even more clearly than in the opinion,

the question of segregation *per se* as a denial of equal protection, in addition to the separate-but-equal question, appears to have been squarely raised.

As shown in the briefs, the two principal points presented in the *Gong Lum* case in 1927 were:

1. "A child of school age and otherwise qualified and eligible to attend a public school in the school district wherein the child resides under statutes providing for a uniform system of free public schools, is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race." R. page 34; Brief of Plaintiff in error page 5.

2. "A child of school age and otherwise qualified and eligible to attend a public school in the school district wherein the child resides under statutes providing for a uniform system of free public schools, is denied the equal protection of the laws when she is excluded from such school solely on the ground that she is a Chinese child and not of the Caucasian race, when no other school with accommodations equal to those of the school from which the child is excluded is maintained which the child might attend." *Id.*

The Attorney General of Mississippi said on page 2 of his answering brief:

If it is a violation of the Constitution of the United States to segregate the races in the public schools of the various states, then section 207 of the Constitution of Mississippi is repugnant thereto and should be stricken down.

It is respectfully suggested that Chief Justice Warren's brief disposition of the *Gong Lum* case in

Brown v. Board of Education, 347 U.S. 483, 491, is open to question. He said, "The validity of the doctrine itself (separate but equal) was not challenged." In fact, the question of segregation *per se* as a violation of equal protection appears to have been clearly raised, and the cases cited by the court with approval support its conclusion. Indeed, the unanimous Court, speaking in that case in 1927, through Mr. Chief Justice Taft, said:

The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.

The foregoing is the *per se* question raised by the plaintiff in error.

Later on Chief Justice Taft takes up the "separate and equal" question as follows:

The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black.

The case appears to have raised and disposed of both questions *unanimously* in 1927.

ALFRED J. SCHWEPPE
Seattle, Washington

Challenges a Statement by Mr. Pittman

■ In the June, 1956, issue of the AMERICAN BAR ASSOCIATION JOURNAL (Vol. 42, No. 6) on page 588 in the text of an article, "The Fifth Amendment: Yesterday, Today and Tomorrow", and in footnote 14A, Mr. R. Carter Pittman states that George Mason's holograph of the Federal Bill of Rights, written about 1788, "lies unrecognized, unhonored and unsung among the *Mason Papers* in the Library of Congress", and that the "first draft of our Bill of Rights, which became living law is unguard-

(Continued on page 810)

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(Continued from page 808)

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You may also be interested to know that two other documents from

this group of Mason Papers have been on exhibit for several years in the Library's Shrine; one of these is the Virginia Bill of Rights of 1776 in the autograph draft of George Mason and Ludwell Lee.

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**A Gratifying Letter
from a Reader**

■ "The Fifth Amendment: Yesterday, Today and Tomorrow", by R. Carter Pittman, Esq., appearing in the June, 1956, issue of the AMERICAN BAR ASSOCIATION JOURNAL is one of the most carefully considered, informative and helpful articles on the subject that I have read. With unusually careful documentation, the author traces the history of the Fifth Amendment, its basis, purpose and

use, and shows clearly how the courts have legislated a completely different amendment from the plain and specific language of the existing one.

The AMERICAN BAR ASSOCIATION JOURNAL and Mr. Pittman have made an outstanding contribution to an important subject which during the past few years has been obscured by self-described "liberals". I have read a great many of the publications on this subject during recent years, and if this letter seems enthusiastic it is only because I feel very strongly that Mr. Pittman's presentation is by far the most useful, clear and persuasive contribution that has been made.

LEON J. OBERMAYER

Philadelphia, Pennsylvania

**"Mr. Justice Jackson's
Greatest Achievement"**

■ Mr. Otto E. Reik in his contribution to "Views of Our Readers" in the June number of the JOURNAL refers to the great tribute paid to Mr. Justice Jackson in the speech of Mr. Gordon Dean (of counsel for the United States at Nuremberg) which was cited in the October, 1955, issue of the JOURNAL. Referring to the International Military Tribunal, he says (page 583) that "Mr. Justice Jackson initiated and directed the enactment of the international criminal legislation; he should be regarded as the father of this newly created important branch of the law." He also states that "The great majority of the American jurists, among them many prominent politicians, regarded the Nuremberg war crime legislation as an unlawful action." He quotes Senator Taft as saying "We might have discredited the whole idea of justice in Europe for years to come." He adds: "This was the view of the critics." It would seem nearer the truth to say that this was the prevailing view of the lawyers and judges generally throughout the United States. Senator Taft surely could not

(Continued on page 812)

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(Continued from page 810)

be classified merely as a "prominent politician" or a "critic" when he was universally acknowledged to be one of the nation's great lawyers, and one of the greatest United States Senators in our history.

Mr. Reik speaks of the Nuremberg war crime legislation. There was no legislation at Nuremberg. There was a palpable simulation of due process which ended in the destruction of the lives of men. There was merely an agreement among four nations of the world that they would prosecute citizens of a fifth nation without any legal right whatever. The whole proceedings cried loudly of power but there was not an audible whisper of authority.

Mr. Justice Jackson as United States Prosecutor (also at the same time a Justice of the Supreme Court of the United States "on leave") admitted that they had no judicial precedent for the Nuremberg proceedings. (*Vide: The Case Against the Nazi War Criminals*, page 77.) Nevertheless he asked the so-called Tribunal *judicially* to extend the provisions of the law of nations in order to supplement its admitted weaknesses. This, of course, is plain usurpation. International law extensions and amendments can be made only by agreement among the nations who adopt and wish to be governed by them. He added that he could not subscribe to the "perverted" reasoning that progress in the law cannot be made at the expense of *morally* guilty lives. (*Ibid.*, pages 76, 77).

Col. Murray C. Bernays, who is said to have "formulated the basis for the war crime trials," makes the following remarkable statement which appeared in *Reader's Digest* of February, 1946: "True, what is happening in Nuremberg is revolutionary. But it is not a revolution in the law. It is a revolution in law enforcement." In other words it is lawless enforcement, which is exactly what the due process clause prohibits. And the Colonel continues: "The man in the street knows the score." We submit that this flippant phrase touches the last depths of supercili-

ous scorn for international law or any law whatever. We are asked to accept the opinion of the "man in the street", our outraged feelings, our anger, our spirit of revenge, our wish, if you please, that the law might be stretched to fit the crime, and then proceed without any legal sanctions whatever to destroy the lives of men. Unfortunately the effect of this "revolution in law enforcement" will be and has been magnified infinitely for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent upon him our retributive emotions only antagonizes an enemy nation and hinders and delays the peace of the world. We win the war but we lose the battle.

Our great American patriot Tom Paine said: "He who would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent which reaches himself."

George Bernard Shaw, in an interview during the Nuremberg trials when questioned about the German atrocities, said: "Yes, but WAR is the great atrocity." War is man's biggest social evil. He alone must solve this problem. The causes of war must be ascertained and removed. Killing a few German leaders after the war is attacking the problem from the top rather than at its source. Killing these murderers will not prevent like crimes nor future wars, any more than the execution of murderers under our domestic laws prevents future murders.

The proceedings at Nuremberg were therefore not only illegal—they were unscientific and futile.¹

SAMUEL A. HARPER

Merritt Island, Florida

1. *Vide: Congressional Record*, Vol. 92, No. 118 Appendix, page A3763.

Another Compliment for Mr. Pittman

■ I congratulate you for publishing Mr. R. Carter Pittman's article on the Fifth Amendment in the June, 1956, issue. Mr. Pittman's approach to the interpretation of the Constitu-

tion seems to me to be the only proper approach. In these days when *stare decisis* and history are so commonly ignored, it is refreshing to read an article which expresses the legal philosophy which seems to me to be the basis behind our common law system.

MURRAY M. MCCOLLOCH

Los Angeles, California

The Practice of Law and Accounting

■ Dean Griswold's recent remarks about the combined practice of law and accounting had great merits, because they showed that the "protection of the public" angle, which was allegedly the first concern of the zealots on both sides of the controversy, was only another word for the elimination of competition.

Obviously every tax problem is a *mixtum compositum* of accounting and law and should be handled by persons qualified in both fields. Nobody is better prepared for the task than one who has fulfilled the rigorous requirements of both professions, is bound by the ethical restrictions of both groups and is experienced in both fields.

Mr. George O. May's observations to the Dean's bizarre problem of elimination of the fittest are admirable for their restraint.

OTTO L. WALTER

New York, New York

A Questionable Character—Is Smokey Bearable?

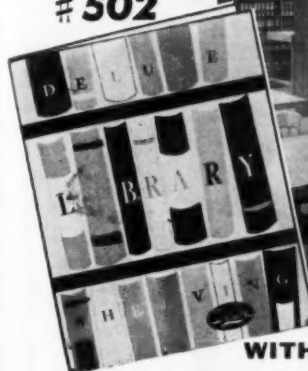
■ The March, 1956, issue of the AMERICAN BAR ASSOCIATION JOURNAL published the talk by Miss Marjorie Merritt, Director of the National Conference of Bar Examiners, given at the annual meeting of the Association of American Law Schools, in New York City. Miss Merritt drew an interesting analogy to "Smokey the Bear".

It is not the purpose of this letter to challenge the analogy, but merely to provide a corollary as to the qualifications of Smokey. The following excerpts are taken from the proceedings of the 46th Annual Western Forestry and Conservation Association conference. The follow-



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ing quotations are taken directly from the record of the conference proceedings.

Mr. L. T. Webster had the topic of "Game and Animal Damage" and reported as to bear:

Bear damage is confined primarily to the coastal Douglas fir and redwood types in British Columbia, Washington, Oregon and Northern California. It is probably more localized than other animal damage, however, and is intensive in problem areas. Damage occurs mostly on trees 8 to 20 inches in diameter. In the Spring when sap is flowing freely, offenders appear to have an appetite for the cambium layer. At this season they rip off large areas of bark thus damaging and often killing [sic] individual trees. Damage in several areas of Washington and Oregon has reached proportions of a magnitude requiring intensive control measures.

Mr. H. F. Thomas reported on "Damage by Game and Other Animals" as follows:

For many years we have heard reports on bear damage to young stands in Washington and California. We

found no evidence of damage in our own stands although we frequently saw black bear on our lands. We thought Oregon bear were better behaved until in 1952 we heard of bear damage to young trees on the Roaring River Tree Farm in Linn County. Our foresters checked some of our young stands without finding any evidence of ruin by bruin. The bear must have passed the word along because in 1953 we found the first damage in our 25 to 30 year old stands. A few trees were girdled or partially peeled in some of our medium stocked south slope areas in late spring. In 1954 the bear really went to work on some of these young stands. Our foresters were working in these stands at the time and reported fresh damage in April and this continued until mid-July. In one small area more than 80% of the stems in a medium stocked stand were girdled or damaged. That is when we started asking our loggers and visiting hunters to shoot bear on sight. Some bear have been killed but the damage continued this year and it looks like we will have to kill more bear if we are to protect our young trees.

Mr. G. H. Hansen reported on be-

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half of the Fish and Wildlife Service as to "Game and Animal Damage" as follows:

Bear have been doing considerable damage during the past 6 or 8 years in some localities to Douglas fir. It has been demonstrated that bear can be trapped readily and bear populations reduced to a point where the damage to trees is negligible. Areas where bear reduction work has been carried on during the past two or three years will be checked next spring to determine whether or not it will be necessary to remove additional bear from these areas. Usually found in small colonies, Mr. Bear can be controlled.

It is the purpose of this letter to bring to your attention that it might be wise to apply Miss Merritt's procedures for investigating moral character to "Smokey the Bear" as it appears from the above recognized authorities in the field of western forestry, that Smokey "might just" refuse to sign a questionnaire revealing his recent activities.

Seriously, the publication of the

Views of Our Readers

talk of Miss Merritt was readable and interesting and the effect of her proposals should not be lessened by the recent activities of Smokey.

THOMAS C. STAGER

Salem, Oregon

More on "Status of Forces"

■ After reading Mr. William Irwin's letter in the December issue of the JOURNAL, I was not sufficiently provoked to write on the subject of the Status of Forces Agreement, but upon reading a passionate denunciation of the agreements by a United States Congressman recently, wherein he indignantly pointed to the "unfortunate" Americans forced to submit to the judgment of foreign courts and to be confined in jails of the worst sort, I, too, waxed indignant, but toward the view illustrated by the Congressman.

I served as an officer on a heavy cruiser in the Far East in 1953-1954 and did not have any experiences with the NATO agreements, but did have a thorough briefing in the administration of a similar agreement made between this country and Japan. I had, on many occasions, the opportunity to represent naval personnel in courts martial, wherein they were accused of crimes against the Japanese persons and property. Later, while serving my commanding officer as his legal adviser, I had a great deal of experience in an administrative capacity in dealing with crimes against the Japanese. Most of the time, the Japanese authorities were happy to turn the men over to us for discipline if they would merely apologize to the persons offended and make restitution where damage to property was concerned. I was surprised at their willingness to let us handle the problem. Only the most heinous crimes were taken before the Japanese tribunals.

On occasion, I discussed with some of the Japanese authorities the problem of Americans whose respect for persons and property was somewhat limited. The forbearance

and understanding of the Japanese was far above what we could expect if the situation were reversed and the crimes committed by Japanese in our country.

They did insist, however, that where the crimes were so outrageous as to attract great public attention, it was necessary to subject the offender to the law which had been disobeyed.

The tremendous number of crimes against the Japanese each year on the part of American servicemen is appalling. And too often does the punishment meted out by the disciplinary authorities of the Armed Forces fall short of compensating the crime or deterring the Servicemen from resuming the error of their ways. And it should be pointed out here that the fear of being subjected to the Japanese system of justice was one of the strongest deterring forces in the area where I served. The local police were effective and the system of justice certain—and our men knew it.

The smashed store windows, drunk servicemen lying in the gutter, rape, robbery, and general violence exhibited by some of our men could hardly be classified other than as a degradation of the American flag and the perfect example of *personae non gratae*. Mr. Irwin, *et al.*, would have that same flag protect these men from the offended sovereignty. If Mr. Irwin had talked with a Japanese merchant writhing in pain after being pounced upon by a gang of young hoodlums in uniform, or visited shopkeepers whose stores were ransacked by a soldier or sailor or marine or airman, or had seen the aftermath of brutal beatings and killings by our young ambassadors, I feel certain that he would not seriously question their punishment by the authorities whose dignity was offended. Our system of military justice seldom is effective in these situations and certainly trial on the soil of this country by an American jury would not accurately measure the seriousness of the offense.

Insofar as my thoughts are concerned, there is no internationalism

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involved. I wholeheartedly agree that minor infractions should be left to United States authorities and they usually are, but heinous crimes against the people of the sovereign nation of the type too often observed in foreign countries, might well be submitted to the system of law so flamboyantly offended.

My personal experience, sans hearsay, has been that in the Far East the agreements are discriminatingly administered by all parties concerned and, to a large measure, have a very fine effect on reducing the crime rate among Servicemen who are prone to commit offenses against the local citizenry. And, it is my opinion that Servicemen who lie in Japanese prisons may thank themselves for their predicament—and certainly may not be correctly labeled "martyrs to internationalism".

JAMES A. WILLIAMS

Dallas, Texas

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Stranger Picketing:

Permanent Injunction or Permanent Litigation?

by Thurlow Smoot • of the Ohio Bar (Cleveland)

■ This is an analysis of a problem that arises from the different and sometimes contradictory policies of the state governments, as expressed by their courts, by the labor board, and by the Federal Government, which has its own policy as expressed in the National Labor Relations Act and the pronouncements of the federal courts and the National Labor Relations Board. As the Supreme Court had occasion to hold again on the last day of the October, 1955, Term, there is an area of control of labor relations that belongs to the states. The problem is to define that area. Mr. Smoot discusses the cases decided since *American Federation of Labor v. Swing*, handed down in 1941.

■ On February 10, 1941, the United States Supreme Court in *AFL v. Swing*¹ issued an historic decision granting labor unions the right of organizational picketing by strangers, i.e., non-employees, in ruling that a state court injunction against such picketing was a violation of the constitutional guarantee of free speech. Yet, today, fifteen years later, labor unions all over the country are still being enjoined by state courts and are still litigating in dozens of cases the question of whether or not they may picket for organizational purposes. How could a decision purportedly settling the issue touch off such apparently permanent litigation on the subject? And is there a possibility of the litigation coming to a conclusion in the near future? The answer to the first question is discussed herein. The answer to the second is "no!"

On the day of the *Swing* decision, the Supreme Court decided the *Meadowmoor* case,² according

recognition to the *Swing* doctrine, but ruling that such constitutional guarantees can be lost as protection where force and violence attend such picketing. These cases then firmly established the principle that a labor dispute between the picketed employer and his employees was not necessary to ground a union's right to picket an employer when violence is not present. And the Court later in *Allen Bradley v. Wisconsin Employment Relations Board*³ ruled that mass picketing was within the category of violence, but still it was clear from these decisions that stranger picketing, i.e., picketing by non-employees of a company, to organize its employees was legally proper and could not be restrained by state courts. But the litigation continued; injunctions against such picketing were still issued in the state courts and it was not long before the question was again before the Supreme Court, now based for the first time on the

"purpose" of the picketing. In *Giboney v. Empire Storage & Ice Co.*,⁴ the Supreme Court said that stranger picketing could be enjoined by a state court where the purpose of the picketing⁵ was to require the employer to violate a specific state statute, in that case, the Missouri Anti-Trust Act. Thus, for the first time, there came into these cases the question of whether the objective of the picketing was of importance. Theretofore, the Court had, in the *Bradley* and *Meadowmoor* cases, made it clear that when the "means" used by the pickets, i.e., violence or mass picketing, was illegal, the picketing could be enjoined by the state courts. Now in *Giboney*, the Court was laying down the rule that the objective of the picketing could be illegal and if it were, state-court injunctions could ban such picketing.

A year later, in *Building Service*

1. 312 U.S. 21. The exact facts in *Swing* become important when later we discuss interpretations and modifications of it. The Supreme Court said: "A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize *Swing's* beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, *Swing* and his employees began the present suit."

2. *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287.

3. 315 U.S. 740.

4. 336 U.S. 490.

5. The exact purpose of the union as disclosed by its picket signs was to force *Empire Ice and Storage Co.*, to cease selling ice cream to non-union dealers; thus in a round-about way "to organize".

Employees v. Gazzam,⁶ the *Giboney* principle was extended to cover (and enjoin) picketing held to have the illegal objective of forcing an employer to coerce his employees into joining the union, which objective had been held by the state court to violate Washington state policy as declared by its legislature.⁷

And later in *Journeyman Plumbers v. Graham*,⁸ this doctrine was held to cover picketing which the Court found had several objectives, one of which was found to be in violation of a state "Right-to-Work" statute.⁹ Now the Supreme Court said if one objective of the picketing in any way violated public policy as expressed in a state statute, a state court could enjoin all picketing.

In the meantime, two cases appeared before the Supreme Court, *Hughes v. Superior Court*,¹⁰ from California and *Teamsters Union v. Hanke*,¹¹ from Washington, wherein stranger picketing had been enjoined. However, in these cases, no state statute was involved. The California Supreme Court held that picketing which would result in "discrimination" was "unlawful". The Washington Supreme Court held that the picketing "constituted coercion" and was "unlawful". The United States Supreme Court explained (as the state courts had not) that what the state courts had meant by declaring the picketing "unlawful" was to make it unlawful as "against public policy" and that was a proper limitation on the *Swing* doctrine. In the *Hanke* decision, the Supreme Court also announced (339 U.S. at page 473):

In determining whether injunctive restraint against picketing for a purpose contrary to public policy of the state is in violation of the Constitutional guarantee of freedom of speech, it is immaterial whether the public policy of the state is established by the legislature or by the judiciary.

The Court also explained its position generally on picketing:

The effort in the cases [on picketing] has been to strike a balance between the Constitutional protection of the element of communication in picket-

ing and "the power of the state to set the limits of permissible contest open to industrial combatants", *Thornhill vs. Alabama*, 310 U.S. 88. A state's judgment on striking such a balance is, of course, subject to the limitations of the Fourteenth Amendment. (339 U.S. at page 471.)

Then the Court further explained the *Swing* doctrine, as follows:

What was actually decided in *American Federation of Labor vs. Swing*, 312 U.S. 321; *Bakery & Pastry Drivers & Helpers Local vs. Wohl*, 315 U.S. 769; and *Cafeteria Employees Union vs. Angelos*, 320 U.S. 293, does not preclude us from upholding Washington's power to make the choice of policy she has here made. In those cases, we held only that a state could not prescribe picketing merely by setting artificial bounds unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute.

The Swing Doctrine . . . After Fifteen Years

So fifteen years after its issuance, the *Swing* doctrine, as interpreted by the Supreme Court itself, seemed to be that picketing by "strangers" (non-employees) was not *per se* enjoinable but if a "purpose" of the picketing was held by a state court to be against state policy, a state injunction would be allowed to stand. The Supreme Court had not and has not yet specifically upheld an injunction against stranger picketing "to organize" the employees, but it would seem this could be done

6. 339 U.S. 532.

7. Here, the "purpose" or objective of the picketing was found to be to force an employer to grant a union shop contract and the legislature had declared it against public policy for an employer to coerce his employees. However, the union merely requested the employer to bargain and had sent a contract to him containing a union shop clause. When the employer refused to discuss the contract, the union picketed. Overlooked by the court, was the fact that union shops and even closed shops are legitimate bargaining objectives in Washington, *Yeager v. IBT*, 239 P. 2d 318, and had the employer agreed to bargain, the union might well have given up its request for a union shop or entered into an election to determine if all the employees wanted it and if so, the employer could have signed it without violating public policy of the state. Actually, again it was "to organize".

8. 345 U.S. 192.

9. Here the Building Trades Council had insisted the General Contractor have a "100% union job." A subcontractor employed non-union men, so the court found "one" objective of the picketing—to force discharge of non-union employees—violated a "Right-to-Work" statute, and thus all picketing was enjoined.

10. 339 U.S. 460. The *Hughes* case did not involve picketing by a labor union, but by a

in the appropriate case by the Supreme Court explaining that in the *Swing* and *Angelos* cases, no question of the state court having found that state policy had been violated was before the Court.¹² If this last portal is closed, then stranger picketing is indeed becoming a right of unions which they may always be enjoined from using.¹³

Obviously, *AFL v. Swing*, has not become the Magna Charta of organizational picketing that labor unions and their attorneys had proclaimed it to be. Stranger picketing to organize employees can be enjoined, not only if the "means" are illegal (violent or *en masse*), but if any objective of the picketing is held by a state court to be against the policy of the state, either as shown by a statute or as determined by that court.

And the state court injunctions issued in as great a number as they had prior to the *Swing* case, but now not because the picketing was illegal, but because the "means" or "objectives" were illegal. In the case of improper means, state court rulings were uniform and the picketing was enjoined, whenever violence or picketing *en masse* occurred.¹⁴ In regard to an improper objective, the state courts always enjoined picketing when an "objective" or purpose of the picketing in any way was found to be contrary to policy as expressed in a statute.

Negro organization to obtain the employment of more Negroes. The state court said that such employment on the basis of race was unlawful because it was "discriminatory", i.e., a successful outcome of the picketing would result in discrimination. This is the only one of these cases where obviously the picketing was not in any way "to organize" employees.

11. 339 U.S. 470. The *Hanke* case involved picketing by a union to obtain membership of two partners who had no employees and to obtain a contract limiting hours of business. The state court merely said "the picketing activity [by the union] constituted coercion and was therefore unlawful."

12. In this manner was *Giboney* removed as a block by the *Weber* decision on pre-emption. See *infra*.

13. The portal seems about to be closed. In *Maine*, it was held that stranger picketing "to organize" was coercion of employees and thus violation of statute and the U.S. Supreme Court dismissed the appeal. *Pappas v. Stacy*, 116 A. 2d 497. Appeal dismissed October 24, 1955. 76 S. Ct. 117.

14. The only questions left in this sort of cases were whether the violence was sporadic or continuous and if found sporadic, only violence was enjoined and the number of pickets limited; or in mass picketing, the question of how many pickets constituted a mass was argued and again some picketing was allowed.



Speltz

Thurlow Smoot has been with his own firm in Cleveland since 1947. A graduate of the University of Colorado Law School, he worked as both regional and appellate attorney with the National Labor Relations Board between 1937 and 1940, and was a trial examiner with the Board from 1945 to 1947. During World War II, he was with the 854th Tank Destroyer Battalion.

latter case because the court found the "purpose of the picketing was 'advertising'" and not coercion. And in Kentucky, the Supreme Court of that state enjoined picketing for having an improper objective as determined by the common law of the state.²⁵

Practically all Ohio courts were engaged in interpreting the situations caused by the Ohio Supreme Court's decision in 1941 in *Crosby v. Rath*,²⁶ where the court had ruled (prior to *AFL v. Swing*) that it was "unlawful" in Ohio for a union to picket for the purpose of forcing an employer to sign a contract which would cause it to discharge employees if they did not join the union, as this did not constitute a "legitimate trade dis-

conflict with the Taft-Hartley Act and under the Garner decision held unconstitutional, see discussion *infra*.

22. *Wood v. O'Grady*, 307 N.Y. 532.

23. 239 Ill. 283. Same result by Missouri Supreme Court, *Bellerive Country Club v. McVey*, 28 L.C. 69,278, with important rationale in showing how the Court decided from the facts what the purpose was.

24. 125 N.E. 2d 700.

25. *General Drivers v. American Tobacco Company*, 264 S.W. 2d 150, later reversed on another ground by United States Supreme Court, 348 U.S. 978.

26. 136 O.S. 352.

For instance, in Texas, any picketing not condoned by state statute was held to be against the statute and enjoined.¹⁵ While in New York, where the picketing was for recognition while a request for certification was pending, the court held it to be against public policy, as set forth in the Labor Relations Statute, and the union was enjoined.¹⁶ In Michigan, the Labor Relations Statute required an election prior to a union entering into a contract with a firm. So there an appellate court held that organizational picketing, where an election had not been held, was against public policy as expressed by that statute, and was thus for an improper objective,¹⁷ while the Maine Supreme Court held flatly that picketing "to organize", was in violation of that state's statute giving workers the right of association free from "coercion", etc.¹⁸ Three states meanwhile prohibited organizational picketing by statute: one in Oregon by forbidding picketing for the purpose of "coercing" or even "influencing" an employee to join a union; the others in Wisconsin and Arizona, by again defining "labor dispute" as between an employer and a majority of his employees and forbidding picketing if there were no "labor dispute". The Oregon Supreme Court upheld the constitutionality of the Oregon statute¹⁹ distinguishing *Swing* by quoting the United States Supreme Court's own interpretation in *Building Service v. Gazzam* that in *Swing* "this court struck down the state's restraint of picketing based solely upon the absence of an employer-employee relationship."

But the Wisconsin and Arizona statutes would fail even this test and the Wisconsin and Arizona Supreme Courts so held. In Wisconsin, in companion cases, the Supreme Court said that that statute was unconstitutional as determined by *Swing* and further that another statute granting employees the right to be free from coercion in organizing (similar to the Maine statute) did not apply to picketing by a union. The Wis-

consin Supreme Court appeared in these two well-reasoned opinions to recognize that there is not any right of stranger picketing (as authorized by *Swing*) if every purpose of picketing can be construed as illegal. But, in February, 1956, eight months after its two decisions, the Wisconsin Supreme Court, on rehearing, completely reversed its holdings based upon: "the right to engage in legitimate business free from dictation by an outside group".²⁰ This theory seems to be that *Swing*, although clearly applicable, is not to be followed if the picketing has hurt the employer's business. The Arizona Supreme Court, however, declared that the *Swing* doctrine had not been overruled and that the Arizona statute was therefore unconstitutional.²¹

But where there were no statutes applicable, state courts usually found organizational picketing to be against state policy expressed in some other way, even by that court not proved to be against public policy. New York is an exception. There, the purpose of the picketing was held to be "to organize the employees" of the firm picketed, and the appellate court stated this was not proved to be against public policy in New York in the absence of a statute so declaring public policy and the injunction was refused.²²

In Illinois, however, the Appellate Court in *Bitzer Motor Co. v. Local 604 Teamsters*,²³ decided by that case that stranger picketing "to coerce the employer to sign a contract with the union when its employees were against the union" was against public policy therein and thereafter in Illinois. And this was affirmed by the same court in *Simmons v. Retail Clerks*,²⁴ although the injunction was denied in this

15. *International Union v. Cox*, 212 S. W. 2d 1000.

16. *Goodman v. Hagedorn*, 303 N.Y. 300.

17. *Universal Car & Service Co. v. IAM*, 27 L.C. 68,825.

18. *Pappas v. Stacey*. See footnote 13, *supra*.

19. *Gilbertson v. Culinary Workers*, 282 P. 2d 368; *Voght Inc. reversed* 74 N.W. 2d 749.

20. *Voght Inc. v. IBT, Local 695*, 71 N.W. 2d 359; *City of Waukesha v. Plumbers*, 71 N.W. 2d 363; *Voght Inc. reversed* 74 N.W. 2d 749.

21. *Shamrock Dairy Inc. v. Teamsters Local 310*, 28 L.C. 69, 480. That all three statutes in Oregon, Arizona and Wisconsin would be in

pute" between the employer and his employees. On the day the *Swing* case was decided, the U. S. Supreme Court denied certiorari in *Crosby v. Rath*.²⁷ Later the Ohio Supreme Court refused to modify its order²⁸ and the U. S. Supreme Court again denied certiorari,²⁹ and Ohio courts and lawyers have been arguing ever since as to what *Crosby v. Rath* had decided.³⁰ But in 1955, in *Chucales v. Royalty*,³¹ where the court of appeals had upheld the banning of all picketing on the ground that it was "stranger" or "organizational" picketing and thus not a "legitimate trade dispute" as defined in *Crosby v. Rath*, the Ohio Supreme Court in no uncertain terms declared Ohio courts should from now on enjoin all such picketing because:

The public policy of Ohio, as determined by its courts, regards picketing against an employer as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted by persons who were never employed by that employer and who do not represent anyone who ever was, and where it is conducted for the purpose of pressuring the employer to compel his employees to join the union of those conducting the picketing.

Thus, the historic *Swing* case did not give labor the right to peacefully picket for organizational purposes but rather led to fifteen years of litigation with the end result of having each state determine its own policy by its courts, either by the court's construing a statute as determinative, interpreting case law as determinative or itself instituting the "public policy" to be for or against such picketing.

The Garner Case . . . A Rude Jolt

But then in late 1953, this state by state determination of policy was rudely jolted by the U. S. Supreme Court in *Garner v. Teamsters Union*,³² when it added the problem of federal pre-emption to the subject with a subordinate problem of interstate commerce as distinguished from intrastate commerce. In *Garner*, the Court held that organizational or stranger picketing

when alleged to be a violation of the Taft-Hartley Act,³³ cannot be enjoined by state courts whether or not it is found to be for the purpose of violating the public policy of the state as expressed either by statute or case law. This brings in for the first time, the inter-intra state commerce problem as state courts still might be able to enjoin if it were shown that the firm being picketed was not subject to the Taft-Hartley Act as that Act only applies to interstate commerce. In the *Garner* case, arising out of the Pennsylvania state court, picketing had been enjoined by a lower court and the injunction dissolved by the Supreme Court of Pennsylvania on the ground that the picketing constituted unfair labor practices under the Taft-Hartley Act, and, therefore, the state court did not have jurisdiction under the so-called pre-emption doctrine, that is, that the federal law pre-empts state law. The Supreme Court upheld the Supreme Court of Pennsylvania, saying:

It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioner presented it to that body . . . but it is clear that the Board was vested with the power to entertain the grievance.

And in the *Capital Service* case,³⁴ the Supreme Court added that the Labor Board could obtain injunctive relief from federal courts to prevent enforcement of a state court's

injunction banning picketing, in a dispute involving unfair labor practices under the Taft Hartley Act.³⁵

Then in *Weber v. Anheuser-Busch, Inc.*,³⁶ the Supreme Court held that the pre-emption doctrine applies, even where the picketing violated the Anti-Trust Law of Missouri. This, of course, was in direct conflict with its decision in the *Giboney* case, and the Court disposed of the difficulty and apparently of all its prior decisions limiting organizational picketing, by saying "the Missouri Supreme Court relied upon *Giboney* . . . for the proposition that a state court retains jurisdiction over this type of suit. But *Giboney* was concerned solely with whether the state's injunction against picketing violated the Fourteenth Amendment. No question of federal pre-emption was before the court; accordingly, it was not dealt with in the opinion." Thus, the Court is stating that had this issue of federal pre-emption been raised in the *Gazzam*, *Hughes*, etc., line of cases, it might well have refused to allow the banning of picketing.

Also, the Court in the *Weber* case reviewed its other holdings on the "delicate problems of the interplay between state and federal jurisdiction touching labor relations;" it also summarized its holdings where the authority of the state to enjoin was found not to have been exclusively absorbed by federal enact-

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27. Cert. den. 312 U.S. 690.

28. 139 O.S. 151.

29. Cert. den. 316 U.S. 688.

30. There are literally dozens of decisions of Common Pleas Courts in Ohio granting injunctions against stranger picketing on the authority of *Crosby v. Rath*, or denying injunctions against such picketing on the ground that *Crosby v. Rath* is not the law. These are too numerous to cite here. Ohio Courts of Appeal have also ruled both ways. For instance, stranger picketing for the purpose of obtaining a closed shop is not enjoinable. *Iacomini's Restaurant v. Hotel & Restaurant Employees*, 107 N.E. 2d 413; *Clark County Lunch Co. v. Waiters*, 22 O.A. 265, and *Donofrio v. Bartenders*, Unreported No. 132,350. Mahoning County Court of Appeals, 1954; stranger picketing to bring pressure on employer to compel him to force his employees into the union is enjoinable and the *Iacomini* decision is "overruled and abandoned". *Bean v. Local Union*, 114 N.E. 2d 145, also *Grimes & Hauer Inc. v. Pollock*, (first decision) 115 N.E. 2d 468, reversed on rehearing on basis of *Garner*, 119 N.E. 2d 189 and *Chucales v. Royalty*, above.

31. 163 O.S. 372; 127 N.E. 2d 203. Cert. den. U.S. Supreme Court, May 7, 1956.

32. 346 U.S. 495.

33. Labor Management Relations Act, 1947; 29 U.S.C.A. 401.

34. *Capital Service, Inc. v. NLRB*, 347 U.S. 501.

35. But in *Amalgamated v. Richman*, 348 U.S. 593, the Supreme Court held that even though the state court was wrong in enjoining picketing which should be handled by the National Labor Relations Board, the federal courts on petition of a union may not enjoin enforcement of such state court injunctions and that a union can seek relief from state court injunctions only through the Labor Board or state appellate courts. However, later, while supporting the *Richman* decision, the Tenth Circuit Court of Appeals in *Retail Clerks v. Your Food Stores*, 225 F. 2d 659, held that if the cause for injunction is removed to federal court on motion and that court stays the state court injunction on the ground only the Board has jurisdiction, the employer cannot, when the NLRB declines jurisdiction, go back to the state for injunction as the matter is *res judicata* and the employer's only remedy is to appeal the district court ruling.

36. 346 U.S. 485.

A Change Is Inevitable:

Problems of Automobile Accident Litigation

by Ella Graubart . of the Pennsylvania Bar (Pittsburgh)

■ No one can open a daily newspaper without being confronted by half a dozen stories about one of the greatest of our domestic problems: the increasing number of deaths and injuries resulting from automobile accidents. Every accident means a potential lawsuit, and the number of such lawsuits now accounts for over 75 per cent of all the litigation in our courts. Miss Graubart argues that we must change our methods of dealing with these cases which have so clogged the calendars of our courts that speedy justice has become impossible.

■ No one familiar with the trial of cases involving automobile accidents can deny that some improvement is necessary in their disposition. Many lawyers resent efforts to change the law, but they cannot escape the suspicion of being accessory to a system from which they derive a substantial advantage.

In 1953, 38,300 people were killed in traffic accidents and 1,350,000 were injured. Each one of these accidents created a lawsuit based upon liability arising from someone's negligence. Most of the accidents happened in a split second making it impossible to recapture or recreate the facts on which to base negligence; many of the accidents were due to some negligence on the part of both drivers of the colliding cars; some accidents were not due to anyone's negligence.

Under our present law, each accident is treated as an isolated phenomenon resulting from the fault of individuals without relation to its effect on the community as a whole. Each is considered as theoretically

avoidable, but the "fault" which kills 38,300 people and injures 1,350,000 a year is a predictable consequence of the behavior of human beings under certain circumstances and is as much a catastrophe to be guarded against as a hurricane, flood or drought. Indeed, the National Safety Council can estimate with amazing accuracy and regularity the number of deaths from traffic accidents which will occur over a given week end.

The callousness of the general public to traffic accidents and deaths is itself a curious phenomenon. No one in a lifetime of hazardous living is nearer death or injury than when he casually rides in his motor car along the highway.

It was safer, although not nearly so pleasant, between the lines in Korea or in World Wars I and II. The casualties in all three wars together did not equal one year's toll of dead and injured on the roads of the United States in peacetime.

For the casualties of war, the Government very properly spends large

sums annually in pensions, for hospitals, for rehabilitation and for the care of widows and children. And, while of course there is no moral duty of government to take care of the casualties resulting from automobile accidents, the economic consequences to the nation as a whole are no less important.

We should, then, reconsider the substantive law of "fault" to see if it provides the best method for the solution of the economic and legal problems resulting from the annual avalanche of automobile accident litigation.

We need not shudder, as some commentators do, at the thought of displacing "fault" as the cornerstone of recovery. The concept of fault was not always with us. Before fault, there was absolute liability for tort, and this theory is still a respected basis for recovery in trespass *quare clausum fregit* and *res ipsa loquitur* cases.

We must at least compare the doctrine of liability for fault with other theories advanced to see if our present system represents the most efficient and just method.

Traffic Accidents . . . Congestion in the Courts

At the outset, we have 70 per cent to 80 per cent of all litigation in the courts, both state and federal, con-

cerned with injuries and damages resulting from traffic accidents.

Other litigation, equitable, civil and criminal, is delayed and the dispatch of business in the courts impeded by this log jam of traffic negligence cases.

So clogged have court calendars become that judges in various parts of the country have initiated techniques of one kind and another to hasten the settlement or trial of these cases. Among these techniques are efforts to obtain waivers of jury trial, settlements at pre-trial, arbitration of small claims, admissions and waivers of oral proof of many items such as repair bills and hospital bills, and efforts to eliminate conflicting medical testimony by a court appointed physician.

Most of these techniques have relieved the congestion a little, but they are only mild procedural palliatives for a situation which requires a comprehensive re-examination of substantive law.

As long as a stroll through the corridors of any metropolitan court in the country during jury trial sessions discloses one courtroom after another being used to determine the fault for injuries and damages resulting from automobile accidents, the courts cannot administer either with dispatch or competence all the litigation arising from other twentieth-century problems.

An Economic Burden . . . Delay in Paying Claims

Hundreds of thousands of persons who are injured each year in automobile accidents suffer heavy economic losses. They incur hospital and doctor bills and lose wages. Many a family is bereft of its entire income. Other families are deprived of necessary automobile transportation. Apart from tragedy and inconvenience, the economic burden as a result of automobile accidents is appalling. Most people have to wait an average of two or three years to be paid their claims.

If they engage a lawyer and file suit, their cases will not come up for trial in metropolitan areas for years.

If they are willing to settle their claims, they are fortunate if the automobile which inflicted the damage was insured. More than one third of the motorists on the highways of the United States are not insured. But even where there is insurance, there is not necessarily a desire to effect a prompt settlement on the part of the insurance companies. If they wait until the case is ready for trial, they can usually settle on the same terms as they would have at the beginning. In the meantime, they have had the use of millions of dollars during the two or three years before settlement. They pay no interest for the delay.

An examination of the cases listed for trial on a given day in a large city shows cases filed as much as five and six years ago. Most of the cases listed were filed two or three years before they appeared on the calendar for trial.

The twentieth century with its concern for efficiency should be able to provide a better service for the millions of victims of automobile accidents.

Uninsured Defendant . . . Unlikely To Pay Judgment

Not every victim of an automobile accident has a defendant worth suing. Unless an individual defendant is insured, it is unlikely that he can be made to pay any judgment which might be obtained against him. Statistics vary in different parts of the country, but it may be fairly stated that approximately one third of all drivers of automobiles are not insured. These people are usually the young, the poor and the irresponsible.

Nothing can be gained by suing them. Thus, in thousands of cases, victims of automobile accidents cannot recover because of the financial irresponsibility of the drivers or owners of cars.

In addition, the law in many states frees certain organizations of any responsibility for the carelessness of their employees. Accidents due to the negligence of drivers employed by hospitals, universities, charities and some state and muni-

cipal corporations create no legal claim for damages. The drivers of the cars are usually without financial responsibility and the employers and owners of the cars are not liable for the negligence of their employees.

In the case of some municipalities, the rule of liability rests on the tenuous distinction between governmental and proprietary functions. If the driver of a city truck is engaged in a governmental function, the city is not liable; if in a proprietary function, the city may be liable.

The theory behind these rules of non-liability is worn out and under suspicion.

In a society where 1½ million traffic accidents occur annually, the denial of any relief to persons injured by the carelessness of drivers because of their financial irresponsibility or the nature of their activities is an anachronism.

A world famous composer was seriously injured while driving on a super-highway when an employee of the highway commission drove onto the highway at a non-access point. For this victim, there is no remedy as the highway commission cannot be sued for the negligence of its employee and the employee is financially irresponsible.

Witnesses and Facts . . . Indispensable to Collection

If the driver or owner of a car is insured or financially responsible, the person injured in an automobile accident has a chance to collect damages.

But to succeed, he must be able in the United States to prove (1) that the accident was due to the carelessness of the defendant and (2) in most jurisdictions that the plaintiff was entirely free from fault.

The facts to support these conclusions must be produced in court by witnesses.

Witnesses are indispensable. Without them, it is useless for a lawyer and his client to enter the courtroom.

Thus, the essential ingredient of a lawsuit of this kind is the witness

who can prove or disprove negligence.

Sometimes, witnesses of an accident give their names to the injured but more often witnesses drive off, in order to avoid the necessity of testifying for one side or the other.

Not only are witnesses indispensable, but the kind of testimony they can give must not be uncertain or inconclusive. If a witness is to testify for the plaintiff, he must be ready to say the accident was caused by the defendant's carelessness. If he is to testify for the defendant, then his testimony must tend to prove fault in the plaintiff.

But automobile collisions occur in split seconds. Seldom is a person observing with full attention the exact spot where the collision will take place or the approach of both vehicles from different directions to the point of contact.

These witnesses will testify two or three years later to the speeds of both vehicles, their positions on the roadbed, weather conditions, and minute measurements to prove the negligence of one or the other driver. This is a strain on one's memory and honesty, but the law requires these details to support a finding of liability or non-liability.

A woman with two small daughters stepped out of a car to buy some vegetables at a roadside stand. While she was thus engaged with her back to the highway, her husband stepped out of the car and was killed by a speeding truck. No one saw the accident, except the truck driver, who could not be expected to admit his own negligence. Without a single witness, what should a lawyer do to recover damages for the widow and orphans?

Unequal Verdicts . . . A Question of Justice

The billions of dollars paid annually for damages and injuries to victims of traffic accidents are unevenly distributed. One person with a broken collarbone may get \$500, another \$5,000.

Much depends on the choice of a lawyer. Insurance companies offer larger settlements to experienced

lawyers than to non-fighting members of the Bar.

Much depends on the amount of insurance which the defendant carries. If he carries \$10,000 and three persons are injured, no matter how severe their injuries or how great the loss of earnings, there may be no chance of getting more than \$10,000. If, however, the amount of insurance is \$100,000, each of the three persons injured in the accident can expect to get a substantial amount.

Much depends upon the character of the insurance company. Some insurers are notoriously uncoöperative and niggardly; others are eminently fair and willing to coöperate in making a settlement.

If a case comes to trial, much will depend on the parties to the litigation and their witnesses. Juries feel deep sympathies, usually with the plaintiff but sometimes with the defendant. These may be due to psychological, sociological, religious or other irrelevant factors. Often, a plaintiff may get twice what he ought to get because he is a pleasant witness with an engaging manner.

Two passengers injured when a bus suddenly stopped, sued the bus company for negligence. In one courtroom, the jury returned a verdict for \$6500 for the plaintiff; in the other courtroom, the verdict was for the defendant.

In a country which pays 4½ billion dollars for personal injuries and property damage every year, is there not a better measuring rod by which to distribute the money necessary to reimburse the victims of automobile accidents?

High Stakes . . . Ethical Problems

Recoveries in metropolitan courts are often in excess of \$100,000 for one plaintiff. The \$50,000 verdict which was considered large ten years ago is returned by juries today with nonchalant regularity. From these verdicts, plaintiffs' lawyers retain from 25 per cent to 50 per cent for their fees and expenses. Indeed, successful plaintiffs' lawyers are earning



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more money today than counsel for the largest corporations in America.

With such high stakes have come practices which the Bar cannot long ignore—ambulance chasing, perjury of witnesses, payment of hospital and doctor bills by lawyers, prejudiced medical testimony, claims which are exaggerated by the use of skeletons, colored anatomical pictures, exhibits, x-rays and other paraphernalia which plaintiff's counsel thinks will move the jury to allow more than his case is worth.

On the other side of the table, experienced counsel for the insurance companies maneuver to minimize damages by every trick which experience has proved leads to a small verdict or an occasional verdict for the defendant.

Counsel for the defendants retained by insurance companies are usually paid on a per diem basis. They, therefore, are not interested in settlements before a jury is picked, i.e., before they have a day in court. Both plaintiffs' and defendants' lawyers in these negligence cases which occupy approximately 75 per cent of all of the time of

the courts, have a cynical disregard of the burden which the taxpayers carry to provide an arena for the trial and settlement of negligence cases. A successful plaintiff's lawyer can count on a quarter of a million dollars annually from verdicts and settlements in traffic accident cases.

New Conditions . . . New Legal Formulas

Lawyers resent doubt or criticism of accepted legal ideas. But new exigencies of a physical, economic or social nature may demand new remedies. At the least, we must dispassionately re-examine our legal formulas to see if they suit the new conditions.

We should remember Sir Edward Coke's warning:

The lawes of nature are most perfect and inimitable; the conditions of human lawes grow into an infiniteness; and there is nothing in them permanent or stable, human lawes are bred, they live, and they die.

Sir Matthew Hale said:

The matter changeth the custom; the

contracts the commerce; the dispositions, educations, tempers of men and societies change in a long tract of time; and so must their lawes in some measure be changed, or they will not be usefull for their state and condition.

Judge Mansfield insisted that established rules based on reasons which no longer applied to modern conditions must be changed.

Only recently, the Supreme Court of the United States in referring to the basis for liability of municipalities for negligence, "deplored the 'inevitable chaos when courts try to apply a rule of law that is inherently unsound'".

The need for progressive legal thinking and for a searching analysis of legal behavior must be apparent to all those who are seriously interested in the law. It is natural for some minds exercised by habits of dispute to approach new ideas with skepticism and scorn. But when the rules which we have do not result in fairness or justice to millions of our citizens, then we

should be ready for a comprehensive study of the problem both in human and financial terms, to discover if possible a more efficient and equitable set of legal principles for the solution of the yearly avalanche of claims resulting from automobile accidents.

Some change is inevitable. What it should be depends upon a study of the economic, social and psychological effects of the present system. This study should not be made by plaintiffs' lawyers or defendants' lawyers or insurance men or professors out of touch with the practical realities of settlement and trial of these cases. Such a study should be made by objective research men who can make an unbiased report with recommendations based upon factual data.

This would furnish a basis for such changes, both substantive and procedural, as may be necessary to provide speedier and juster solutions for the annual toll of injury and damage which automobiles inflict upon our society.

Statistics of Legal Aid Work in the United States and Canada

■ The annual report, "Statistics of Legal Aid Work in the United States and Canada", for 1955 has just been released. This report, prepared at the request of the Committee on Legal Aid Work, presents the number of cases handled, the population served and the gross cost of operation of all known legal aid organizations giving service during the calendar year 1955 and reporting to the National Legal Aid Association.

Taken as a cold block of figures, it fails to dramatize the significant changes in the growth of legal aid nationally. But by comparing it to the figures released for 1954, certain heartening trends are inescapable.

There was a marked advance in the number of available legal aid facilities, from 275 to 309. A total of 475,218 cases was handled at a

gross cost of operation of \$2,150,010.29. The most notable increase came in connection with the public defender organizations where public defenders went from thirty-four in 1954 to sixty-four in 1955, an increase of thirty or 88 per cent for one year! Even though some of these existed unknown to this Committee, this increase in number of new public defenders is very encouraging.

Legal Aid offices are up five in number, from 161 to 166. These include eighty-one legal aid societies, ten departments of social agencies, twenty-nine bar association offices, twenty-nine referral offices, twelve law school clinics and five public bureaus.

Reports from fifty-three organizations revealed that the collection of small claims and family support

items totaled \$706,941.52. An additional twenty-two organizations reported that moneys were collected either through the office or directly by the client but records of the amounts involved were not kept.

Of the organizations reporting, forty-seven indicated that there was a nominal charge made for applications or service. \$126,545.58 was received from such sources and applied to operating costs.

This report is the result of a compilation and analysis of figures sent to the National Legal Aid Association by local offices throughout the country. The Committee on Legal Aid Work, in co-operation with the National Legal Aid Association, makes this report for those who want an objective picture of where we stand in the united effort to make legal aid available to all who cannot afford to pay.

The President's Annual Address:

The Ancient Challenge—Lest We Forget

by E. Smythe Gambrell • *President of the American Bar Association, 1955-1956*

■ Article III, Section 2 of the By-laws of the American Bar Association requires the President to deliver an annual address before a joint session of the Assembly and the House of Delegates "upon such topic as he may select with the approval of the Board of Governors". President Gambrell chose the subject, "The Ancient Challenge—Lest We Forget" for his address, which was delivered during the opening session of the Annual Meeting in Dallas, Texas.

■ The year you have given me in the Presidency of the American Bar Association has brought many personal satisfactions: the opportunity to serve our profession; the privilege of working with its leaders; and the pleasure of witnessing constructive accomplishments. And I am grateful for what this year has taught me. Meeting with lawyers throughout the states and territories and probing with them the vital questions of this time of trial and transition, I have learned much about the character and temper of the American legal profession. For one who has enjoyed the good fortune of this experience, there is no escaping an inspiring sense of the latent power and unity of the Bar.

Wherever choice or chance has placed us and whatever path of professional endeavor we pursue, we labor in the service of a common cause, steadfast in our devotion to the principles of freedom under law and firm in our resolve that the greatest shall be judged with the lowliest, that no man shall be weak

when right is on his side. If all lawyers could unite in the concert of their single aim, the voice of professional brotherhood would rise in a mighty anthem of freedom, a resounding hymn to justice.

As a symbol of the unifying power of professional ideals, this assembly has a meaning more exalted and more enduring than the immediate concerns that have brought us together. We are reminded by our meeting that the glories of the law have not come from the individual working alone. The great matters determined and the great things done have stemmed from a never-ending organic process, to which lawyers without number have contributed in shares immeasurable.

Perhaps no other of man's callings requires so much of disciplined self-reliance or demands more of the individual conscience. Still the lawyer cannot live in isolation. The stature of the professional man is not the measure of the man standing alone. He is part of a larger endeavor, building upon the work

of generations past and partaking of the success and the failure of his contemporaries. So it ever was, and so it must be with a legal profession worthy of the name. Without co-operative enterprise, the practitioner lacks an essential professional ingredient. Only in joint effort with his fellows can he realize the full scope of his function. The charge of public service that lifts the law above the level of a craft or trade will see fulfillment only in united action, and our claim to professional status will find its proof only in the effectiveness of our collective units. The breadth of professional mobilization must match the scope of the public responsibilities to be met, and a day of nationwide challenge demands commensurate action, coordinated and marshalled by an all-inclusive national organization.

A Solid Phalanx . . . Bound by a Common Purpose

The year now coming to its close has brought a heightened recognition of these facts of professional life. As one man, the existing membership of the Association rallied to the campaign to make of us a truly representative organization. In heartening accord, lawyers everywhere responded to the mobilizing call and accepted the hand of professional fellowship. In consequence of our

unprecedented growth, we here mark a new beginning. In one aspect, our Association has assumed a different identity. With an infusion of fresh spirit and vigor and a broadened representation, the American Bar Association henceforth will speak in another voice. But in a larger sense and upon the higher plane of purpose, our organization stands strengthened but unchanged, its animating ideals the same. Today American lawyers stand united as never before, a solid phalanx drawn up in defense of human freedom, bound together by a common purpose.

During my travels of the past year I have tried to direct my thoughts and efforts to the major problems that beset both the profession and the public in these anxious days. There is one great issue of our time, one persistent theme that commands the attention of thoughtful men everywhere. Human freedom transcends all else in importance. It is the lawyer's first concern; the profession was born and nurtured in its service. In the roiling turbulence of a sea of change, we are becoming conscious of an all-enveloping fog that closes in upon us and threatens to engulf the dignity of man. We are becoming aware of subtle forces, both within and without, that would lead us to an existence devoid of honor and of hope. We are coming to the realization that liberty is an indivisible whole and that to attack any part is to threaten all. We are beginning to recognize that freedom can be lasting only if it is universal and that no man is truly free so long as another languishes in bondage.

During my recent travels in the Soviet Union I looked in vain for a system of law as we know it, for due process, for law which the rulers as well as the governed must at all times obey. I looked for those principles that are the commonplaces for the practitioner in the common law—in short, for some token of the rule of law. Despite the recent protestations of repentance and reform,

notwithstanding the current gestures of good will, that unhappy country remains subjected to an absolute authority over the minds and thoughts of its people. We dare not forget that, wherever freedom is denied, there is a menace to the freedom we claim for ourselves.

Here in our modest fraction of the world, we have endeavored to keep the hands and the minds of men unchained. We have sought to keep the light of the human spirit undimmed. We have attempted to provide a place where a man can live out his life in peace and dignity, secure in the right to seek the truth, to speak freely, to follow the religion of his choice and to build his own livelihood from the raw materials of boundless opportunity. We set no limits for human hope, no price on human life, and the human soul we have valued above all else. The annals of history contain no record more lustrous than our own in the story of man's striving to be free. We have drawn near enough to catch a glimpse of the summit of our aspirations, where liberty will be the birthright of every man, beyond denial by any government. The potential of the individual in all its rich divergence has been set free, releasing a driving vitality, a tireless energy and a power for progress unprecedented in the history of man. The aggregate accomplishment is a near miracle of material abundance, a plentiful endowment in the comforts of a full life. Here new horizons of human happiness and hope have been revealed, and no one can foretell their limits.

Too often, it seems, these precious gifts are taken for granted. We have enjoyed the fruits of freedom for so long that we are inclined to forget the price that was paid for them. We are too ready to regard our privileged lot as the normal human condition, and to overlook the wisdom, toil and blood that won our liberty. The epic struggle that has lifted mankind from the enslavement of brute force begins with

our earliest written history. For the freedom to follow their consciences, the prophets of the Hebrew and Christian faiths suffered imprisonment and death rather than to renounce a God whose love gave each man dignity and worth. In the great Anglo-American tradition, the striving to fulfill the divine promise of the human being has continued without respite for nearly one thousand years. From the grudging concessions of King John at Runnymede through the sacrifices of American patriots in the Revolution that set this land on the course of its independent destiny, from Magna Charta to this very hour, generations of selfless men have fought for their faith in man's capacity and courage to find and to follow the truth. These, our fathers, were building for a day they could never see; their labors and their lives were dedicated to generations then unborn, that they might find a better world.

The ancient struggle is not yet won. There will always be godless men who thirst for power. In ever-changing form and manifold guises, the forces of oppression confront each age anew. In the fight for freedom there is no final victory. To win today gives only the chance to strive again tomorrow.

In our time, it seems to have fallen to us, the American people, to determine for all mankind whether human beings are capable of governing themselves in peace, order and mutual respect, or whether they are forever destined to grovel as slaves to the tyrant. We are entrusted with the benefits and blessings of liberty in the fullest measure man has known. We are custodians of the eternal hopes and yearnings of mankind. Freedom-loving peoples throughout the world turn to us for the light of the mind set free. For some, the lamps of liberty have never been lighted. For others, for whom the lamp once burned, the light is out. It is our challenge, it is our charge, to keep the faith a benevolent Providence has commit-

ted to us.

Change is as ceaseless as life itself. The old order yields to the new, and the rivers of our national life flow endlessly on. As lawyers, we know there is no stopping, no turning back. Our calling was conceived in the need to bring order and direction to the forces of change, and it is our daily function to ease the myriad processes of adjustment to altered circumstance. As custodians of change, we live out our professional lives in close communion with the tides of transition. From this perspective, we can see the ever-flowing currents of generations past and yet to come and sense the continuity of life in its changing and constant patterns. In charting a course for the future, we must first know the past.

Our Surest Guide . . . *The Wisdom of History*

Our surest guide in troubled times is the wisdom, the grandeur, and the tragedy of human history. The accumulated experience of the ages is ours if we will but harken to the voices of our fathers across the silent spaces of time. The truth that proved itself in the past will endure as a force at work through never-ending variations. The selfishness that would renounce this heritage of freedom for our temporary advantage breaks faith with our fathers and abandons our children. The principles of liberty must stand as everlasting landmarks above the shifting currents of change; the ebb and flow of circumstances must be confined within channels fixed by the rule of law.

Ours is a restless age, a time of ferment and of growth. The wonders of modern science have pushed back the physical horizons, and the developments of a resourceful technology have opened new vistas of hope. Before us lies the prospect of a richer, fuller life for us and for those who come after us. But more and more it is borne in upon us by current events that mastery of our physical environment may prove



E. Smythe Gambrell

more a curse than a blessing unless we achieve a mastery of ourselves as well. Progress in the means of travel and communication and the discovery of vast new sources of energy have made men increasingly interdependent, producing fresh frictions and multiplying the potentialities of conflict.

The complexities of life, pyramiding one upon the other, have put us increasingly at the mercy of forces beyond our control and often beyond our understanding. Accepted truths are challenged and ancient faiths are shaken in the turbulence of discovery and growth. The cynicism of the big lie, of the propaganda barrage and of godless ideologies has spread its evil contagion to produce a massive disbelief in enduring values. Established pat-

terns of living have been disrupted, family ties are strained, the stabilizing bond that linked man to land has been dissolved in easy mobility, and the pride of the workman has been engulfed in the impersonal operations of the machine. A catastrophic economic collapse left many baffled, unsure and resentful. The monstrous inhumanity of which man proved himself capable in two great wars revealed with frightening clarity how precariously thin is the veneer of civilization that overlies the instincts of the brute. The threat of nuclear war raises up new specters of fear.

Today the American tradition faces a challenge that finds no precedent in our history. In this time of convulsive upheaval, our people lack confidence in their power to

cope with the perplexities that confront them. A clamor for protection and security can be heard in all quarters. Afraid they may be tried and found wanting, some would choose not to be tried at all. The cry for security at any price is the signal call for a retreat from freedom, a surrender to unreasoning fear. We are doomed to thralldom if we sacrifice what has been preserved for us at such great cost for the comforting certainty of the chain. We must sink to that servile state from which we climbed so laboriously if we renounce the right to choose and to think for ourselves—if we forget the bitter lessons of history. We hear around us the call for a leader who will shoulder our burdens of choice, for some man of action to take command. A person of quick promises, who feels power and forgets right, can readily exploit a public sense of apprehension and despair. Whenever the stakes are high enough, whenever the political establishment is large enough, a demagogue will appear. This trend in a time of conflicting forces was foreseen by Washington in his Farewell Address, when he warned, "The disorders and miseries which result, gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation on the ruins of public liberty."

There are those today who would have us forget that no dictator will long remain benevolent and ignore the corrupting force of power as taught in harsh experience. These voices of despair tell us that the complex questions of the day are beyond the ken of the ordinary man and that our hopes and aspirations will all be realized without the pain of effort or the risk of failure if we will only submit our lives and our destinies to the ministrations of some all-wise paternalism. We are told that the answer to our anxieties lies

in an immense power which will gratify our desires and watch over our fates. We are assailed by those who claim to know what human wants and needs are deserving of satisfaction and the pattern which every man must follow for the decent life. They would lay down for all a prescribed balance of work and leisure and select the recreation and cultural pursuits that all men would be taught to follow. They would tell us what political and religious beliefs we must hold and determine for all the good, the true and the beautiful. The power they profess is like that of the parent, except that instead of preparing us for manhood it would keep us in perpetual childhood. It would make government the sole arbiter of happiness, the regulator of all activity. It would not destroy life, but deprive it of all meaning. The philosophy pretends to a high regard for the common man, but it denies his competency to provide himself with the necessities of life in an abundant economy, and his capacity to form opinions or hold beliefs that are worthy of respect.

It is a fatal delusion that men who lack the wit to care for themselves will somehow find the infinitely greater wisdom required to choose a leader who will do the job and that we are still free so long as we elect our keepers. The fallacy was plain one hundred and fifty years ago when Jefferson exposed it in these words, "Sometimes it is said that man cannot be trusted with the government of himself. Can he then be trusted with the government of others? Or have we found angels in the form of kings to govern him? Let history answer this question."

Uncharted Frontiers . . . Our Constant Challenge

Today there are vast uncharted frontiers—physical, spiritual and intellectual—standing as our constant challenge. We may well lose our will and our ability to cope with these challenges if we develop and accept the habit of being satisfied with the meager crumbs of material security

which some form of benevolent government would dole out to us. To the extent that we permit ourselves to be so dependent upon government that we can no longer think or achieve on our own, and dependent upon government for those things which traditionally we have provided for ourselves, we defeat the very meaning of democracy and permit government to rule rather than to serve the individual. By every step we take toward making the government caretaker of our lives, we move toward making it our master.

The American nation was founded in the faith that strength for the ages can be generated by the release of the human spirit. The concept has guided us not only to a life of human dignity, but to material abundance. We have believed that true and lasting security lies in progress and improvement. The quest for social welfare and economic security in its extremes is alien to this tradition. If each man is to be free to shape his own destiny, to realize his own potential, to think and to build, then each must assume a measure of risk. Only in the complete repression of human growth and advancement is there complete security, for the possibility of change is by definition insecurity. Only by confining every man to a predetermined mold can any of us be secure. Protection from intellectual or economic innovation, resourcefulness or development is the antithesis of freedom. One who is secure from any risk of failure must also be secure from the opportunity to succeed. To be freed from anxiety, mischance or error is equally to be freed from all possibility of growth or achievement. Through the rhetoric of security, the meaning of freedom is being shifted in subtle ways from freedom to do as we choose to freedom from the necessities of choice.

The essence of the human condition is the aspiration for something better. In the pallid utopia of a fixed, stable and never-changing social order, where all men would be happy, equal and secure, society

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Judicial Self-Restraint:

The Obligation of the Judiciary

by Ralph T. Catterall . *Member of the State Corporation Commission of Virginia*

■ Mr. Catterall finds in the School Segregation cases another example of what he considers to be the tendency of the Supreme Court of the United States to substitute for the written Constitution the economic, moral and political convictions of the justices. His article reviews the history of this trend and cites examples of warnings by members of the Court itself that this lack of judicial self-restraint leads to judicial despotism.

■ In his address at the John Marshall Bicentennial Ceremonies, 41 A.B.A.J. 1009, Chief Justice Warren said:

Insistence upon the independence of the judiciary in the early days of our nation was perhaps John Marshall's greatest contribution to constitutional law. He aptly stated the controlling principle when, in speaking of the Court during his tenure, he said that they had "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required". That is precisely the obligation of the judiciary today. Self-restraint and fearlessness are always essential attributes of every branch of our Government.

An independent judiciary (with power to issue a writ of habeas corpus) marks the dividing line between a free nation and a police state. A police state is a state where the police can hold you in custody as long as they please, and no judge who is not himself afraid of the police can let you out. So the Act of Settlement, 1701, settled the British Crown on the Protestant descendants of the Electress Sophia on condition that they appoint judges for

life; our own Declaration of Independence denounced George III for not extending that principle to the Colonies ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."); and the Constitution of the United States embodies that principle. We cannot get along without it. It is a pearl of great price. The great price that the people willingly pay to have judges who are not dependent on anybody is that everybody is dependent on the self-restraint of the judges. To them we confide the power to make decisions affecting life, liberty and property in return for their promise to apply the law as they honestly understand it.

Dissenting in *United States v. Butler*, 297 U. S. 1 (1936), complaining of the abuse of judicial power and "a tortured construction of the Constitution", Mr. Justice Stone said (page 78):

The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that

courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.

Those words rankled in the breast of Mr. Justice Sutherland for months. To him they seemed to "offend the proprieties" and "impugn the good faith of those who think otherwise". So, dissenting in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937), he unburdened himself (page 402):

The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint.

Judge Sutherland modifies the word "convictions" with "conscientious and informed". It would, however, be impossible for him to hold convictions that were not conscientious and informed. The act of

thinking that a conviction was not conscientious and informed would keep him from entertaining that particular conviction. The importance attributed by Mr. Justice Sutherland to his own convictions is the philosophers' stone that transmutes natural law into positive law. Natural law can never produce a writ of *habeas corpus* in the hands of the sheriff except through the medium of some judge's convictions.

Justice Sutherland was quite right in saying that "self-restraint belongs in the domain of will and not of judgment". It calls for enough will power to resist the temptation to do good. ("Good" in this context means what the judge knows is good. ["Knows" means what the judge knows that he knows.]) Whether, in a given case, the judge will ignore the written law that he has promised to obey in favor of his concept of natural law depends on the strength of his convictions. He will do so only when he knows that he is right. Justice Holmes was sceptical about natural law for the same reason that he distrusted the man who knows he is right.

Chief Justice Marshall had convictions about the sanctity of the ownership of land. He had gone deeply in debt to buy land in the Northern Neck of Virginia, and Virginia had passed a statute the effect of which, if valid, would be to deprive him of his land.

Fletcher v. Peck, 6 Cranch 87 (1810), involved a Georgia statute that deprived landowners of their land. That was before the Fourteenth Amendment; and the due process clause in the Bill of Rights did not apply to the states. Marshall held that the Georgia statute violated the contract clause of the Federal Constitution. But for good measure he held as an independent and sufficient ground for his judgment that the statute was void as a matter of natural law (page 139):

... the State of Georgia was restrained either by general principles which are common to our free institutions, or by the particular provisions of the Con-

stitution of the United States, from passing a law. . . .

He takes his stand that a state law is void in two separate instances: (1) if it violates the Constitution, and (2) if it violates general principles.

Mr. Justice William Johnson, Jefferson's first appointee to the Court, could not go along with Marshall on the constitutional ground. He said (page 143):

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity.

Judge Johnson knows he is right even if the Deity should differ with him. Most supporters of natural law are more modest: they are merely certain that *they* know the Laws of Nature and of Nature's God.

Loan Association v. Topeka, 20 Wall. 655 (1875), held a state statute void on general principles. The Court did not rely on or mention any clause of the Constitution. The Fourteenth Amendment had been on the books for seven years, but the Justices had not yet discovered the talismanic properties of the due process clause. To Mr. Justice Miller the statute looked like robbery, and that was all he needed to know. He said (page 664):

To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation.

Mr. Justice Clifford, on behalf of the self-restraint school of thought, objected that the Court ought not to hold state statutes void without relying on the Constitution or any clause thereof, saying (page 669):

Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism.

The next generation of Justices discovered the intricate beauties of

the due process clause and used it with telling effect in a long line of cases in which they were sure that they knew what was good for the country. Their zeal in protecting the people from the mistakes of their elected representatives was described by Mr. Justice Holmes, dissenting in *Baldwin v. Missouri*, 281 U. S. 586 (1930), as "... evoking a constitutional prohibition from the void of 'due process of law'. . . ."

Speaking of the constitutional rights of the states, he said (page 595):

As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.

But every man has his breaking point, and Holmes himself was faced with a temptation to do good that he could not resist. He was sceptical of many things, but not of the fundamental importance of freedom of speech. It took a long while for the Justices to get around to the notion that they could force freedom of speech on the states. As late as 1922, Mr. Justice Holmes joined in the opinion in *Prudential Insurance Company v. Cheek*, 259 U. S. 530, which said (page 543):

... neither the 14th Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about "freedom of speech"

Three years later it turned out that his brethren were ready, able and willing to bring freedom of speech under the aegis of due process of law. For twenty years Holmes had been fighting a rear-guard action against the extension of the due process clause. He would have had to be more than human to resist this particular extension and he did not resist it. He was 84 years old. In *Giblow v. New York*, 268 U.S. 652, in a dissenting opinion, he said:

The general principle of free speech it seems to me, must be taken to be

included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used. . . .

The most articulate champion of the doctrine of self-restraint on the Bench today is Mr. Justice Black. He implores his colleagues to give up their natural law doctrines and go back to a study of the text of the document and the history from which it grew. Dissenting in *Adamson v. California*, 332 U.S. 46 (1947), he said:

This decision reasserts a constitutional theory spelled out in *Twining v. New Jersey*, 211 U.S. 78, 53 L. ed. 97, 29 S. Ct. 14, that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice."

I think that decision and the "natural law" theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise.

And I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.

But this formula also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.

In *Brown v. Board of Education*, 347 U.S. 483, the Court forbade the states to maintain segregated public schools. In *Bolling v. Sharpe*, 347 U.S. 497, the Court forbade the Con-

gress of the United States to maintain segregated public schools. Both cases were decided the same day, May 17, 1954.

In the *Brown Case* (dealing with state schools) the Court called for the facts of history (as Mr. Justice Black did in *Adamson*). After thousands of hours of laborious research the facts of history were produced: they proved that nobody in 1868 expected the Fourteenth Amendment to abolish segregation. (See Alexander M. Bickel: *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1.) The facts of history were dismissed as irrelevant and immaterial. The Court knocked out state segregation on the basis of the equal protection clause, saying:

This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

But in *Bolling* the Court abolished segregation solely on the basis of the due process clause, thereby demonstrating that it would have reached the same result in *Brown* if the equal protection clause had never been adopted.

In the *Bolling Case* the Court did not call for research into the facts of history. In 1791, nobody thought that the Bill of Rights abolished even slavery, but the Court held in 1954 that words not intended to abolish slavery were intended to abolish segregation.

The basis for the decision in the *Bolling Case* is stated by the Court at the end of its opinion (page 500):

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

This *non sequitur* is unique. The clause of the Constitution on which the state decision is exclusively based does not impose any duty on the Federal Government, as the Court pointed out on the previous page of its opinion (page 499):

The Fifth Amendment, which is ap-



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plicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.

A lawyer would be laughed out of court who argued with a straight face:

In view of your decision that the constitution prohibits the states from impairing the obligation of contracts, it would be unthinkable that the same constitution would impose a lesser duty on the Federal Government.

When you say that something is "unthinkable" you are expressing as forcefully as you can the strength of your convictions. You mean that no honest and rational person could disagree with you. The Court does not say that segregation is unthinkable. The unthinkable thing is "that the same Constitution would impose a lesser duty on the Federal Government". The argument runs that if the Constitution forbids the states to do some evil thing, it is unthinkable that it would impose a lesser duty on the Federal Government. Heretofore the rule of decision has turned on whether the Constitution does forbid something, rather than on whether it would forbid something. What the Court calls unthinkable is that the Constitution "would" forbid an evil

in the states and not in the District. Between September 17, 1787, and May 17, 1954, the doctrine the court calls unthinkable had been universally thought.

The Court could have avoided this difficulty, and could have got out of the frying pan into the fire, by deciding the federal school case first or by basing the state school cases on the due process clause.

The 1791 Amendment says: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The 1868 Amendment says: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Thus the Amendment applicable only to the United States and the Amendment applicable only to the states both contain the same words; and, if the Court had first forbidden segregation in the District on the basis of those words, it would have followed logically that the same words would necessarily produce the same result in the states. The Court passed up the chance to hold that exactly the same words mean exactly the same thing, in favor of holding that widely different words produce exactly the same result. The Court decided the state case first and then held that the state case governed the federal case. That would have followed if the decision in the state case had been based on the due process clause; but the Court did not use the due process clause in the state case even as a makeweight.

If the Court had decided the federal case first, the expensive and useless research into the history of the equal protection clause would not have occurred and there would have been no debate over the facts of history. For 165 years any colored children who were educated in the nation's capital were educated in separate schools. The Justices knew that it would sound silly to ask counsel to search for evidence that the framers of the Fifth Amendment intended it to abolish segregation.

But if the Court had begun at the

beginning, it would have had to begin with a clause of the Constitution adopted in 1791 that did not keep the Congress from passing and the courts from upholding the Fugitive Slave Law of 1850. Members of Congress and Presidents of the United States also swear to support the Constitution; and they had not thought it necessary to integrate the schools in the District of Columbia. The psychological treatises cited by the Court would have justified Congress in abolishing segregation in the District, because for many years it has been well understood that the police power is the power to adopt and enforce a policy to prevent an evil, and that the writings of experts can be cited in support of the argument that what the legislature seeks to forbid could be thought to be an evil. And if the Court had cited the learned treatises in support of its decision based on the due process clause, it would have sounded as if the Court was citing them to support its own exercise of the police power.

The Court does not say in so many words that it adheres to the dogmas of "natural law", but these school cases are not the first in which natural law considerations have played a decisive part. They give comfort to those who believe that the eternal verities should take precedence over the written law, and they are disturbing to those who prefer a written constitution. Progressive modification by the judges of the judge-made common law is a very different thing from abruptly changing a written constitution. If the eternal verities as revealed through the writings of Gunnar Myrdal are to outweigh the words written in the constitution, the concept of the constitution as a solemn and binding contract is destroyed.

The meaning of judicial self-restraint is that the judge will successfully restrain himself from putting his own convictions ahead of the law. If he does not like the written Constitution, it is not for him, in the words of Omar, to "shatter it to bits—and then re-mould it nearer to the Heart's Desire", or, in the no

less eloquent words of Mr. Justice Black, "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the states as well as the Federal Government".

But, as Mr. Justice Black has said, the Court has for many years been roaming at large in the broad expanses of policy and morals; and, as Mr. Justice Holmes intimated, the Court has often embodied its own economic and moral beliefs in the due process clause; and, as Mr. Justice Clifford pointed out eighty years ago, that sort of thing leads to judicial despotism. The strongest denunciations of the Supreme Court are found, not in the speeches of soap-box orators, but in the opinions of dissenting Justices.

In past cases in which the Court has injected its moral views into the picture, it has not upset the domestic institutions of the states. When the Court was holding in a long line of cases, subsequently overruled, that intangible property taxed by one state cannot be taxed by another, there was no concerted outcry from the supporters of a written constitution: the decisions pleased more people than they annoyed. The same thing can be said of the Court's holdings in the realm of freedom of speech and freedom of religion. Most people agree that there is a moral foundation for those decisions; although the constitutional foundation is somewhat shaky. Chief Justice Taney's opinion in the *Dred Scott Case* that an Act of Congress freeing the slaves in the Nebraska Territory deprived the slave owners of their property without due process of law caused a good deal of controversy, but did not interfere with the internal affairs of the states. The school case decisions differ not only in degree but in kind from past examples of "judicial despotism". It is the difference between advancing into forbidden territory step by step and advancing by leap and bounds. The leaps and bounds began with *Shelley v. Kraemer*, 334 U.S. 1 in 1948. When Chief Justice Vinson wrote the Court's opinion in

that case he did not realize what a leap the Court was taking. He found out in *Barrows v. Jackson*, 346 U. S. 249 (1953). In that case, dissenting all by himself, he sputtered (page 267) that the majority opinion:

puts personal predisposition in a paramount position over well-established proscriptions on power.

He, too, cast a backward glance at the good old days of judicial self-restraint, saying (page 269):

Since we must rest our decision on the Constitution alone, we must set aside predilections on social policy and adhere to the settled rules which restrict the exercise of our power to judicial review—remembering that the only restraint upon this power is our own sense of self-restraint.

The alarming significance of the school cases extends beyond the immediate decisions. Never before have the personal predilections and

moral certainties of the Justices ridden so rough-shod over the text of the written Constitution. The Court has found that the moral law which impels it to advance the interests of colored people outweighs the moral law which teaches that a judge who has sworn to uphold a constitution ought to uphold it. Actually, the Court was not faced with a moral dilemma. A judge is not blame-worthy who enforces a written law that he disagrees with, and as a last resort he can resign if the law he has sworn to enforce is more immoral than he can stomach. But the Justices, in the school cases, have trapped in a genuine moral dilemma all those who believe (1) that the Constitution is a binding contract, and (2) that the Supreme Court is the final umpire to interpret that contract.

To illustrate this moral dilemma

with a homely example, let us suppose that two teams are tied in the last inning of the World Series and that the umpire is morally convinced that the Yankees ought to win. The Yankee runner is tagged with the ball forty-five feet from the home plate, and the umpire, acting on his understanding of the precepts of natural law, declares that the runner is safe at home. Those who bet on the Dodgers are then confronted with the problem of whether the moral law requires them to pay their bets, and those who bet on the Yankees are confronted with the problem of whether the moral law permits them to accept the payments. Does the decision of the umpire prevail over the rules of the game? One of the rules of the game is that both teams shall obey the decision of the umpire; and the umpire has promised to stick to the rule book.

National Legal Aid Conference

■ The 34th National Legal Aid Conference will be held in Denver, Colorado, October 10-12, in the completely remodeled and centrally located Albany Hotel. "Post card" perfect weather is guaranteed by the Chamber of Commerce.

The Annual Conference is sponsored jointly by the National Legal Aid Association and the Standing Committee on Legal Aid Work of the American Bar Association, with the co-operation of the Colorado and Denver Bar Associations.

Invitations are extended to legal aid staff attorneys and board members; to public and voluntary de-

fenders and to bar association officials and committees interested in improving legal aid and public defender services.

Outstanding speakers and discussion leaders have been invited by the program committee to assure that every session of the Conference will yield an abundance of ideas and information with the widest possible sharing of experience by the delegates.

Delegates will discuss such problems as: "Debt Adjustment—Regulation or Prohibition"; "Referral and Reciprocity"; "Problems of Intake";

"Confidentiality of Records and Social Agency Inquiries"; "How To Improve Inter-Legal Aid Referrals"; and "A Joint Study of Defender Systems".

Committees will report and officers and board members will be elected for the 1956-57 year.

On Thursday, there will be luncheon in the mountains, followed by a tour of Central City, the gold mining camp district, the "Glory Hole" and other scenic landmarks. Friday evening calls for a reception by the Denver Bar Association followed by the Annual Dinner, the culmination of the Conference.

Should Canon 35 Be Amended?

A Question of Fair Trial and Free Information

by Justin Miller • of the California Bar (Pacific Palisades)

■ In recent months, the press, radio and television have been devoting much space to a problem that concerns lawyers more than any other members of the community. That problem is the place that radio microphones, television cameras and news photographers should have in a judicial proceeding. At present, Canon 35 of the Canons of Judicial Ethics condemns the presence of broadcasters and photographers in the courtroom. To some, at least, it has appeared that the news media are engaged in a well organized campaign to secure a change in the Canon. In this issue, we present three different writers on the subject. Mr. Miller argues that a change in the Canon is desirable. Other views appear on pages 838 and 843.

■ The AMERICAN BAR ASSOCIATION JOURNAL has published several articles concerning Canon 35 and the broadcasting of court proceedings. Pursuant to the traditional and salutary principle of law—that all interested parties should be heard before a case is decided—it seems appropriate to set out the point of view of broadcasters, themselves. Accordingly, the following summary is presented; followed by an analysis of the arguments which have been made in favor of the Canon.

First, as a basis of common understanding it should be noted that the word "broadcasting", as used by Congress in the Federal Communications Act, includes both "radio" and "television" as those words are used in common parlance. Thus Section 3 (o) of that Act provides: "'Broadcasting' means the dissemination of radio communications intended to be received by the public directly or by the intermediary of relay stations." Section 3 (b) provides: "'Ra-

dio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus and services . . . incidental to such transmission." Consequently, the separate designation in Canon 35 "broadcasting" and "television" was repetitious; and, in this article the word "broadcasting" will be used inclusively, except when necessary to distinguish between the two forms thereof, as popularly known.

Second, broadcasters assume that the requirement of due process, in both the Fifth and Fourteenth Amendments, is properly interpreted to require an *orderly procedure*, as an indispensable component of a fair trial or fair hearing.

Third, broadcasters assume the correctness of the proposition—implicit in Canon 35—that if *any* conduct, in the courtroom, materially detracts from the essential dignity of

the proceedings, or degrades the court, such conduct mitigates against the orderly procedure which is essential to a fair trial.

Fourth, broadcasters assume that it is the duty of the presiding judge to preserve order in the courtroom; to anticipate and prevent, so far as he can, any conduct which would be calculated to create disorder; and that he has inherent power to do so.

Fifth, broadcasters recognize that when Canon 35 was adopted in 1937, much broadcasting—as measured by courtroom requirements—was, relatively speaking, inadequate and inefficient.

This, then, brings us to the area of disagreement with Canon 35, as written, and with the statements of those who now insist that it should be strictly enforced. With respect to this area of disagreement, broadcasters are committed to the following fundamental propositions:

I. As stated by the Supreme Court in the *Associated Press* case, 326 U. S. 1, 20 (1944), "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . Freedom to publish means freedom for all and not for some." Eternal vigilance in the maintenance of this freedom is traditionally recognized as a basic factor in the preservation of our liberties.

II. The guaranty of freedom of information which is set out in the First Amendment—and which is made applicable, also in the states, by the due process clause of the Fourteenth Amendment—applies equally to broadcasting, both radio and television; hence the public is entitled to benefit from its dissemination of information; and it is the broadcasters' right and duty to serve the public interest by doing so.

III. The constitutional mandate, concerning freedom of information, is just as imperative as the requirement of orderly procedure under the due process clause; hence the two must be accommodated, one to the other, in such manner as to secure the fullest possible beneficial operation of each.

IV. The constitutional mandate concerning freedom of information necessarily requires free access to the sources of such information; hence all public, governmental proceedings must be accessible to the representatives and facilities of all media of communication which come within the purview of the constitutional mandate; except to the extent that such access may properly be limited under the mandate of the due process clause requiring an orderly procedure.

V. The principle of the common law and the practice of the common law courts—which requires that, generally speaking, all trials, both criminal and civil shall be public—have been incorporated into both federal and state law by virtue of the due process clause of the Fifth and Fourteenth Amendments. Some limitations of the general rule have been recognized—both by the common law and by statute in some states—in exceptional types of cases. However, whenever a trial is public, it would be unconstitutional to exclude representatives of any communications medium; except if and when it should become necessary, in order to insure an orderly procedure.

VI. The broadcasters propose to do everything which they may properly do to encourage freedom of communication; to promote free access to sources of public information, by

representatives of all communications media; particularly as this basic freedom concerns the rights and responsibilities of broadcasters to serve the public. To accomplish these objectives, they will oppose, vigorously, any action, whatever the source, which limits the capacity of broadcasters to give both immediate and delayed coverage to public proceedings; they will encourage and advise broadcasters in the continuing development of improved broadcasting procedures and techniques; they will develop a positive educational program to demonstrate the ability of broadcasters—both radio and television—to use modern mechanical and electronic methods which meet all reasonable requirements necessary for the orderly conduct of judicial, legislative and other public governmental proceedings; and they will co-operate with appropriate professional and other associations to secure relief from restrictions which limit access to, or the dissemination of news and other information.

The Specific Issues . . . The Broadcasters' Stand

Coming now to the specific issues which arise out of Canon 35, the broadcasters stand upon the following additional propositions:

VII. The statement in Canon 35—" . . . the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court . . . and should not be permitted"—is incorrect; as applied to broadcasting, both radio and television, when performed with modern facilities by trained personnel.

VIII. The distraction of a witness in giving his testimony is a relative matter. Many of the normal incidents of courtroom procedure are highly distracting to witnesses. Restrictions imposed by the rules of evidence, reprimands administered by the judge, searching cross-examination, the scrutiny of jurors and of the courtroom audience may all be very distracting. Compared with these normal incidents of courtroom pro-

cedure, the effect upon the witness—of broadcasting, properly performed—would be infinitesimal, even assuming he knew it was taking place.

IX. The statement in Canon 35 which asserts that the broadcasting of court proceedings is calculated to create misconceptions with respect to the court "in the mind of the public", is incorrect, both in fact and in theory, when applied to broadcasting—either radio or television—performed with modern facilities, by properly trained personnel, under the control of the trial judge.

X. Prohibition of the broadcasting of proceedings of any public trial would be a violation of the Constitution, except upon a finding, by the trial judge, that it was necessary to do so—in that particular case—to insure the orderly proceeding required by the due process clause.

Now, with the foregoing fundamental propositions in mind, let us examine the arguments which are made in support of Canon 35. Most of these arguments are based upon the major premise of the Canon which—whatever its original virtue—is now clearly erroneous. To deny the potentialities of courtroom broadcasting, today, because of the inadequacies of radio broadcasting twenty-five or thirty years ago, or of television broadcasting, even eight or ten years ago, would be as unreasonable as to contend that airplanes today are not capable of offensive warfare because of the limitations of the fragile little craft which the Wright brothers flew at Kitty Hawk.

No one who witnessed the television demonstrations—of the House of Delegates and of the Section of Judicial Administration—at the 1955 American Bar Association meeting in Philadelphia could honestly and sincerely contend that broadcasting, so conducted, is calculated to do what Canon 35 alleges. Although the Philadelphia demonstration was made with the express assurance that it constituted no commitment with regard to Canon 35, or the propriety of broadcasting court proceedings, nevertheless, it was so convincing as to reveal clearly the error of the Canon's statement. It is regrettable

that some persons who have authored articles since that time did not attend these bar association meetings.

The Philadelphia demonstration was made with only the lights normally installed in the meeting rooms where it occurred. The personnel in charge were inconspicuous and inaudible; they were men experienced in broadcasting church services—occasions when it is just as necessary to insure dignity and orderly procedure as in a courtroom. The broadcasting facilities were concealed from the participants in the meetings. Some participants were unaware that the demonstrations were going on. The others—who had been informed in advance—were in no way disturbed.

Courtrooms can be readily equipped to make just such broadcasting possible. In recent instances, in Oklahoma and Texas, where trials have been televised, the judges, as well as other participants in the courtroom proceedings, have testified that there was no interference with the dignity of the proceedings, no distraction of witnesses, and that the public was given a much better understanding and appreciation of the serious nature of the courts' work. In Texas, the televised proceedings were shown in classrooms and the instructors testified that, for the first time the students showed real interest in governmental processes—interest which had never been shown in the "bare bones" recitals of civics textbooks.

More recently, a demonstration of broadcasting—both radio and television—was given in the Supreme Court of Colorado; a demonstration in which no equipment was used in the courtroom except microphones, so small and so concealed, that the judges could hardly see them, even when attention was directed to them. The lenses of the cameras could be seen by the judges, through small apertures in a panel placed in a doorway in the rear of the courtroom; but were unseen by the other participants. There were no operators of the broadcasting equipment in the room; there was no noise ac-

companying the demonstration; the noise of the self-winding courtroom clock was particularly noticeable in contrast.

Canon 35 . . . An Inconsistency

These repeated demonstrations of broadcasting's advance in techniques and personnel is reflected also—strange as it may seem—in the second sentence of Canon 35, which was adopted as an amendment in 1952. This amendment permits the broadcasting of naturalization proceedings in courtrooms, for the expressed "purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization". As too frequently happens when laws are amended, no sufficient attention is given to re-statement of the original provisions. Here we are confronted with the incongruous situation that the first sentence of Canon 35 declares, unequivocally, that "the broadcasting or televising of court proceedings is calculated to detract from the essential dignity of the proceedings, . . . and creates misconceptions with respect thereto in the mind of the public. . ."; and then in the second sentence authorizes the use of broadcasting for *demonstrating to the public in an impressive manner the essential dignity and serious nature of court proceedings*.

It would not be possible in this brief article to describe the development of broadcasting—scientific, industrial and professional—which has taken place in the last twenty years and which has so completely changed the situation with respect to the use of broadcasting in reporting public, governmental events. Except for parallel achievements in the field of atomic energy, there is nothing in the long chronicle of human civilization to compare with the advances which have been made in electronics and related sciences, and their application to broadcasting.

While the mysteries of vacuum tubes, transistors, printed circuits, miniature components, image orthicon and vidicon tubes are beyond



Harris and Ewing

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the understanding of most people, we are able to understand that broadcast equipment is becoming more and more compact, hence less obtrusive; that television cameras can utilize normal illumination in a room to produce brighter pictures than are visible to occupants of the room itself; that microphones, transmitters and receiving sets can now be made so small that they can be concealed on the person; as was done, for example, in the televising of *Peter Pan* where Mary Martin and each of the other actors were so equipped, while seemingly flying through the air.

Of equal importance has been the development of skilled personnel and a professional attitude upon the part of those who operate broadcasting facilities. The noise and confusion, caused by the hundreds of reporters who swarmed around the courthouse at the Hauptmann trial in 1935 were indeed calculated to destroy the essential dignity of the proceedings. Presumably, it would be possible for the same thing to happen today, if the trial judge and his court officers were willing to permit it, and—in the case of broadcast-

in—if the personnel were untrained for their work.

But the situation has changed completely in the last twenty years. Broadcasters have adopted their own canons of ethics for both radio and television and are as much concerned with their enforcement as are lawyers and judges with theirs. In broadcasting, today, there are many men of professional training—lawyers, engineers, journalists—as well as others who come from non-professional walks of life, who have just as understanding appreciation of the responsibilities which this great new medium of communication owes to the American people, as do the members of the older professions, in the areas which they represent.

Perhaps in no respect has there been more marked improvement—growth and maturity—than in the handling of news of public events. Occasionally, as in the case of political conventions and of congressional committee hearings, great confusion has been revealed. Sometimes this confusion has resulted from lack of dignity in the event itself; sometimes from the way in which the event has been reported.

But, surely, we have all seen broadcasting so well done, of events so well planned and carried out, that there was no suggestion of confusion or lack of dignity. For example, would anyone suggest lack of dignity in the televised portrayal of the formal portions of the last Presidential Inauguration; the coronation of Elizabeth II; the Pontifical Christmas Mass from the Vatican last December? Do we hear complaints from the participants, or from viewers, of services in the churches and cathedrals of this country, joint sessions of the two Houses of Congress, Cabinet meetings, Presidential news conferences? We need only to remember such programs to remind ourselves of the quality of present-day broadcasting performance, now taken for granted as the rightful privilege of the American people. Would anyone suggest that such reporting of public events creates misconceptions with respect thereto “in

the mind of the public and should not be permitted”?

To the extent, then, that arguments in favor of Canon 35 depend upon the false premise of fact, which is set out in the Canon, and the *non sequitur* which follows it, those arguments must fail. There are a number of other arguments, which are legal or quasi-legal in character; some of which depend upon the false premise and others which do not.

Thus, it is contended, directly or by implication, that broadcasting does not come within the scope of the First and Fourteenth Amendments. The theory of this argument is, presumably, that nothing except speech and press—as known in 1787—is covered, today, by the Constitution. A closely collateral contention is that broadcasting is an “entertainment” medium; and that the constitutional provisions were not intended to insure freedom of communication for entertainment purposes. Both arguments have been thoroughly repudiated both by Congress and by the Supreme Court.

When Congress enacted the Communications Act, it anticipated these arguments and rejected them, by the provisions of Section 326 thereof: “Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”

Both Congress and the Supreme Court have consistently interpreted the Constitution in such manner as to make it applicable to present-day conditions; in some instances extending the scope of its provisions to cover situations of which the Forefathers could not possibly have had knowledge. Specifically, the Supreme Court has held that speech and press as contemplated by the First Amendment—and as extended by the Fourteenth Amendment (*Burstyn v. Wilson*, 343 U.S. 495, 500) compre-

hends every sort of publication which affords a vehicle of information and opinion, including, as well, circulation and distribution. (*Lovell v. Griffin*, 303 U.S. 444, 452) Thus, the following are included: the carrying of signs or banners (*Thornhill v. Alabama*, 310 U.S. 88, 99); displaying a flag (*Stromberg v. California*, 283 U.S. 359); sound amplification devices (*Saia v. New York*, 334 U.S. 558, 561); ringing doorbells (*Martin v. Struthers*, 341 U.S. 622); broadcasting and motion pictures (*Public Utilities Commission v. Pollak*, 343 U.S. 451, *United States v. Paramount Pictures*, 334 U.S. 131, 166, *Burstyn v. Wilson*, 343 U.S. 495, 502, *Superior Films, Inc. v. Department of Education*, 346 U.S. 587).

The Supreme Court of the United States has been equally explicit in rejecting the argument that freedom of communication does not include the communication of entertainment. A good example is found in *Winters v. New York* (333 U.S. 507, 510) where the Court said:

We do not accede to appellee's suggestion that the constitutional protection of a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. Cf. *Hannegan v. Esquire*, 327 U.S. 146, 153, 158, 90 L. ed. 586, 590, 593, 66 S. Ct. 456.

In several cases the Supreme Court of the United States, and other courts as well, have called attention to the fact that, sometimes, highly important reforms have been effected by the use of fiction. In the days when freedom of speech and press was severely abridged by governmental action, sometimes the only way to combat the “oppressor's wrong . . . the law's delay, the insolence of office” was through song and verse and satire. Entertainment? Yes, indeed! But much more than entertainment, as history now clearly indicates. The

(Continued on page 889)

Should Canon 35 Be Amended?

A Newspaperman Speaks for the News Media

by J. R. Wiggins • *Managing Editor of the Washington Post and Times-Herald*

■ Mr. Wiggins approaches the problem of news cameras and radio and television broadcasting in the courtroom from the point of view of an experienced newspaperman. Readers will want to compare his views with those of Justin Miller (page 834) and Richard P. Tinkham (page 843), who discuss the legal aspects of the problem.

■ The case for amendment of Canon 35 rests broadly upon four basic propositions. Simply stated, they are:

(1) The right of access to judicial proceedings is not the right of the accused only but the right of citizens generally.

(2) The use of modern communications devices that permit citizens not present in the courtroom to witness the events observed by those present broadens that right and multiplies the benefits of public court proceedings.

(3) Cameras that record court proceedings for newspaper readers, television audiences and film viewers can be used without interfering with the order or decorum of the courts.

(4) The photographic record can be made without adversely affecting witnesses, jury or officials of the court.

The first two propositions go together. Those who do not subscribe to them cannot be much expected to have an interest in widening the public audience for judicial proceedings, by the use of the camera or any other recording device. Some

lawyers and judges, we must concede, feel that a public trial is for the protection of the accused only. No other single citizen may have a larger interest, but the quality of justice is by no means the sole concern of those under trial.

Public proceedings improve the administration of justice in many ways.

They improve the quality of the evidence. Professor John Henry Wigmore has said that they produce in the mind of the witness a disinclination to falsify because there may be spectators in the court who will "scorn a demonstrated liar".

Blackstone has pointed out the advantages of public trial in this manner:

The open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law; where a witness may frequently depose that, in private, which he will be ashamed to testify in a public and solemn tribunal.

The effects of public proceedings on the witness are described by Jeremy Bentham in these words:

Environed as he sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may, through some unsuspected channel, burst forth to his confusion.

Public proceedings not only improve the quality of the testimony but they are likely to call forth hitherto undiscovered evidence from persons witnessing the proceedings, and the photographic record of a trial, greatly multiplying the audience, multiplies this possibility. Citizens who did not realize their connection with a case, by hearing the evidence may be informed of it and come forth with new testimony or corroboration of testimony already submitted.

Public proceedings improve the conduct of judge, jury and counsel. In Wigmore's opinion, all are "more strongly moved to a strict conscientiousness in the performance of duty" by public proceedings. The open court, in Bentham's picturesque language "keeps the judge while trying under trial". The quotation of a whole paragraph from

Bentham on this point is worthwhile:

Upon his moral faculties it acts as a check, restraining him from active partiality and improbity in every shape; upon his intellectual faculties, it acts as a spur, urging him to that habit of unremitting exertion, without which his attention can never be kept up to the pitch of his duty. Without any addition to the mass of delay, vexation and expense, it keeps the judge himself, while trying, under trial:—under the auspices of publicity the original cause in the court of law and the appeal to the court of public opinion are going on at the same time. So many bystanders as an unrighteous judge (or rather a judge who would otherwise have been unrighteous) beholds attending his court, so many witnesses he sees of his unrighteousness, so many ready executioners, so many industrious proclaimers of his sentence. [RATIONALE OF JUDICIAL EVIDENCE, Book II, Chapter X, Section 2, Subsection 3]

Public proceedings also protect judge and court attendants against the unjust imputation of wrongdoing. Bentham has warned that, without this safeguard, the reputation of the judge "remains a perpetual prey to calumny, without the possibility of defense", while with publicity, "it will in scarce any instance be attempted" and "it will not in any instance be attempted with success".

Public Trials . . . Public Education

Public trials, moreover, educate citizens as to their rights and, in Bentham's words, "by publicity, the temple of justice adds to its other functions that of a school . . . a school of the highest order, where the most important branches of morality are enforced by the most impressive means . . . a theater, in which the sports of the imagination give place to the more interesting exhibitions of real life".

Public judicial proceedings, besides, put on notice of their involvement and interest citizens not hitherto aware of their connection with a case and they permit such persons to engage counsel and prepare to defend their interests in causes of great concern to them of which they

might never know in time to influence decisions if trials were held in secret.

Finally, the public proceedings of the court operate as a check and deterrent upon those who might otherwise be inclined to commit offenses. They see in the proceedings what the law means to forbid. They are furnished examples of the consequences of wrong doing and the certainty of detection and punishment.

The accused, to be sure, has a vital interest that the trial be public, but it has been pointed out that:

After all, although there is a plaintiff and a defendant in each lawsuit, there is a third entity interested in the outcome of the litigation. We mean the public interest that justice be done. [A. S. Cutler *Judicial Administration and the Common Man*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, May 1953, page 107.]

In arguing that a public trial is the right of the accused only, many lawyers cite Judge Thomas M. Cooley's statement in his *TREATISE ON CONSTITUTIONAL LIMITATIONS*, stating:

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused and who would be drawn hither by prurient curiosity are excluded altogether. [CONSTITUTIONAL LIMITATIONS, Volume I., page 647.]

This paragraph often is cited as though the opening sentence read "for the benefit of the accused only". Of course, it does not say that at all. The quotation is from a section dealing with "protections to personal liberty" and, in this context, naturally it is concerned primarily with the rights of the accused and the degree of attendance needed to satisfy his rights. In opening this whole discussion, Judge Cooley says: "It is

also requisite that the trial be public".

Elsewhere, Judge Cooley states:

The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented, as fully as they are exhibited in court, or at least all the material portions of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions which he would not have been likely to receive from hearing the trial itself. [*Ibid.* page 931.]

At another point, he states:

Trials at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue to be privileged. The benefit they produce is great and permanent and the evil that arises from them is rare and incidental. [*Ibid.* page 135.]

Among cases cited by Cooley is *California v. Hartman*, in which the California court stated:

The trial should be public in the ordinary common sense acceptation of the term. The doors of the court room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the courtroom, the convenience of the Court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial. [*California v. Hartman*, 105 Cal. 242.]

The public presence in the courtroom, of itself, tends to improve the administration of justice, but it is also justifiable on a final and a broader ground that the courts, like the executive departments and the legislature, are the creatures of the people who retain the right to alter and improve them when they exhibit observable deficiencies.

Those who argue that the right of a public trial is a right of the accused only sometimes contend that the accused may waive the right. In

this, and in other matters of his defense, the accused is not always the best judge. Frequently, the accused may prefer secret trial rather than face the hazards of the open courtroom, without reflecting that the very publicity he seeks to avoid may result in his deliverance.

If the right of access to the courts is a public as well as an accused person's right, of course, the very suggestion that the person on trial can give away the public's rights becomes ridiculous.

The Public's Right... How Far Does It Extend?

Should the public's right of access to the courts be confined to that part of the public which is present in the courtroom, or should it be extended as far as modern facilities can extend it, to those who can view the proceedings on television screens, films or in newspaper columns?

This really is the question. If the audience in the courtroom is the only part of the public with the right of access, it is a limited part of the public indeed. Judicial districts with hundreds of thousands of citizens can seat only a hundred or two in the courtroom. The complexity of modern life, moreover, has made this scant handful of citizens less representative of the community than the spectators who attended county courts a hundred years ago. Courtroom audiences often may be made up of persons constituting almost a professional class of spectators. Those who might view the proceedings on television surely would constitute a more representative cross section of the society which the court serves.

The camera accomplishes for the audience outside the courtroom the essential function that hearing aids and glasses accomplish for the hard of hearing and the near-sighted inside the courtroom. It brings the court proceedings to a much larger audience and it may bring them, moreover, to an audience that could not, in any case, be in attendance upon the proceedings while they

take place.

The protection of the accused, directly, may be served legally and with essential adequacy, if the trial is attended by a very small number of citizens. The benefits of a general character that public trial confers, on the other hand, can be multiplied as the unseen audience is multiplied.

Granted that there are such benefits, can they be achieved through the camera without interfering with the order and decorum of the court?

A great many judges and lawyers believe that they can. Probably no judge is better informed on the matter than Justice O. Otto Moore. On December 12, 1955, Justice Moore was appointed by the Supreme Court of Colorado as a referee to consider the Canons of Ethics and the Canons of Judicial Ethics of the Rules of Civil Procedure for Courts of Record in Colorado, including Canon 35.

He held public hearings, starting on January 30, 1956. In the course of these hearings, he heard witnesses for and against the canon and witnessed demonstrations of modern devices applicable to photography, radio and television. Some 200 exhibits were received, including photographs taken during the hearings. At the conclusion of the hearings Justice Moore in his formal findings said:

Canon 35 assumes the fact to be that the use of camera, radio and television instruments must in every case interfere with the administration of justice in the particulars mentioned above. If this assumption of fact is justified the canon should be continued and enforced. If the assumption is not justified, the canon cannot be sustained.

For six days I listened to evidence and witnessed demonstrations which proved conclusively that the assumption of facts as stated in the canon is wholly without support in reality. At least one hundred photographs were taken at various stages of the hearing which were printed and introduced as exhibits. All of them were taken without the least disturbance or interference with the proceedings, and, with one or two exceptions, without any knowledge on my part that a photograph was being taken. A news reel



Washington Post Photo
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camera operated for a half hour without knowledge on my part that the operation was going on. Radio microphones were not discovered by me until my attention was specifically directed to their location. Several hours were devoted to the techniques involved in modern production of live telecasts and for one whole day the events taking place in the court room were produced on a closed circuit telecast and shown as they happened on the television set in the court room. Cameras used in photo and television demonstrations were of different kinds. In still photography and newsreel activity they were not noticeable and were operated in such manner that I was unaware that they were functioning. The television cameras shown were of several kinds, varying from the large, already outmoded one which is mounted on a movable tripod, to the small one which is 4"x5"x7" in size. All equipment used, whether large or small, is capable of installation outside the court room with only the lens appearing on the exterior wall, through an otherwise concealed door or window, or from a booth in the rear of the court room. Only the regular lighting at all times functioning in the court room was used, and any court room with ade-

quate sunlight for ordinary court proceedings would require no additional lighting. There was nothing connected with the telecast which was obtrusive. The dignity or decorum of the court was not in the least disturbed. Many persons entered and retired from the court room without being aware that a live telecast was in progress. Others who took seats which were so located that they could see the television screen which was reproducing the hearing were obviously surprised when they observed it a brief time after being seated.

Judge Moore, it is well known, concluded by recommending that "the entire matter should be left to the discretion of the trial judge".

Following the trial, members of the Waco-McLernan County Bar Association were asked to give their opinion of the photography which the court permitted. In one questionnaire they were asked: "In your opinion, did the following detract from the dignity of the court, distract the witnesses or jury, or otherwise disrupt the orderly procedure of the trial?" They answered:

	Yes	No	Percent Answering
			Yes
Press Reporters	10	39	20.4%
Still Photographers	9	37	19.5%
Movie Photographers	10	35	22.2%
Television	5	47	9.6%
Spectators in Court	7	40	14.9%

Forty-eight lawyers thought the television broadcast of the trial improved public opinion of our system of justice, six thought it hurt public opinion and four felt there was no effect.

Forty-nine lawyers would permit television in future trials, seven would oppose it; thirty-seven would permit movie photographers and seventeen would oppose it; forty-three would allow still photographers and thirteen would oppose it.

Out of sixty lawyers interviewed, forty-seven thought the use of the camera should be left to the discretion of the trial judge—the recommendation finally made by Judge Moore, of Colorado.

In his report, Judge Moore dealt with many often heard objections to camera coverage of the courts.

To the charge that telecasting is entertainment, he returned the answer the United States Supreme Court gave in *Hannegan v. Esquire*: "What is one man's amusement, teaches another's doctrine".

To the claim that camera coverage would merely satisfy "idle curiosity" he answered that "under our system of government there is constant regard for the concept of educating and informing our people concerning the proper functioning of all three branches of government".

To the allegation that the camera would cause lawyers and judges to play to the galleries, he answered that a "show-off" "will be just that whether a camera is present or not".

A Public Event . . . No Right of Privacy

To the contention that rights of privacy would be invaded, he answered with court opinions to the effect that "when one becomes identified with an occurrence of public or gen-

eral interest, he emerges from his seclusion and it is not an invasion of his 'right of privacy' to publish his photograph".

To those who object that permission to photograph would flood the courtroom with camera men, Judge Moore pointed to the pooling arrangements entered into by photographers at his hearing.

Many judges and lawyers will have to see for themselves (if they did not see the demonstrations at the American Bar Association meeting in Philadelphia last August) before they will be convinced. The blame for their disbelief is partly that of the press. At most public gatherings they attend, the judges and lawyers still observe cameramen using old fashioned equipment with slow film, requiring flashbulbs or

supplementary lighting. Often, at public functions, they see photographers take up a shooting position that interferes with the speaker, distracts the audience and obstructs the view of spectators. Sometimes they see all too plainly that photographic operations interfere with order and decorum. Such doubts can be dismissed, short of an actual courtroom demonstration, if photographers will take advantage of other public gatherings to show how unobtrusive the camera can be under good conditions.

The camera can be used without interfering with the order and decorum of the court. If it is permitted in the court at all, trial judges can insist upon equipment and tactics that will not disturb the court, just as they insist upon such behavior by other spectators in the courtroom.

Meeting these requirements, it must be conceded, will not answer all the objections of lawyers and judges. The use of invisible cameras would not disarm some members of the Bar. Their objection runs not only to the physical obtrusiveness of the camera, but to the effect of the most unobtrusive camera upon judges, witnesses and jury.

Judge Moore would go far to meet such objections by allowing no photography over the expressed objections of witnesses or jurors. This limitation would keep the cameras out of many court proceedings—although it is notable that the defendant in the Waco murder case did not object to photography.

His caution here only emphasizes how much many lawyers and judges fear the effect of even the invisible camera, particularly upon the witness.

How much would the anxiety of an apprehensive witness be increased by the knowledge that he was being seen and heard, not only by persons in the courtroom, but by citizens outside the courtroom viewing the trial on a television screen or looking at still or motion pictures?

No one knows. It is a matter of

conjecture so far as present information and knowledge are concerned.

It can be argued that the camera lens is a lot less disconcerting in some ways than a courtroom spectator. No camera ever let out an involuntary exclamation of horror, dismay or amusement on the utterance of a witness. No camera ever grimaced or coughed during testimony. No gallery of cameras ever burst into applause and had to be rapped to order by the court. No camera ever wept or laughed.

Perhaps the effect of this knowledge would vary with different witnesses. Curiously enough, some persons who are discomfited by hundreds of spectators speak with relative ease on the radio or television. These devices do not invariably disconcert or discomfit all whose words are broadcast and all whose faces are telecast. Witnesses wholly inexperienced at appearing in public suffer so acutely before the smallest audience that the additional discomfiture occasioned by the knowledge of an additional unseen audience might not be measurable.

Would testimony, on the average, be adversely influenced? That is the question that many lawyers, seriously concerned about trial procedures, wish to have answered.

Richard P. Tinkham, of the Public Relations Committee of the American Bar Association, has suggested a research project to discover the influence of recording devices upon court proceedings. Such a study would be extremely interesting. At the same time, it would have to be remembered that reactions while these devices are a novelty in the courtroom might differ from reactions later on when all witnesses and attendants have come to regard

the habitual broadcasting and photographing of the courtroom as routine. As the camera becomes more and more of a commonplace in all sorts of public places, it will produce in all those whose images are recorded on all sorts of screens, much less self-conscious reaction.

The risk of even the slightest adverse effect will be shunned, of course, by lawyers and judges who see no gain in the transmission of court proceedings to a larger audience. So, in the end, the argument returns again to where it started. Those who believe that the public presence improves the quality of justice will wish to have more of the public see and hear their own courts in action. Those who think that there is better likelihood of obtaining a fair trial away from the scrutiny of the vulgar mob will not wish to have more people watch courtroom proceedings.

Many technical problems will have to be solved if the courts do decide to admit cameras to the courtroom more and more frequently. No special difficulties occur in the case of still cameras and in the case of newsreel cameras. In the case of television, many special problems do arise.

Sponsorship poses some interesting questions. The preservation of privilege by the balanced presentation of testimony involves some production difficulties. The allocation of time for any great number of live telecasts will be troublesome. The unique difficulties involved are sufficiently great to make it plain that it is an impulse of public service that is moving the media to seek better access to the courts. The big cases of enormous public interest and concern will be far apart. Day-to-day coverage of lesser cases will cost money, crews, equipment and

precious television time needed for more popular and more remunerative telecasts.

Public information about the courts will be improved, not only by what is to be viewed on the television screen, but by reports in other media of a higher quality, if television finally is permitted. Court reporting by most newspapers is pretty fragmentary in most cities. Few newspapers have staff for most cases. Citizens who see proceedings in the courtroom over television will not be content with the summary reports now available in newspapers. They will insist on better court reporting, just as they have insisted on better reporting of other events they now see for themselves.

The elimination or amendment of Canon 35 would involve a great many new costs and responsibilities for all media. The privilege of reporting more court proceedings, if it is granted, is going to be an expensive one. It is sought by all media involved, not as a private advantage, but as an opportunity for public service. There are a great many public functions with which cameramen can occupy their time if the sole object is the satisfaction of the idle curiosity of the people. There are few public agencies, the sound functioning of which are of more importance to a democratic society. And there are few legislative or executive establishments of government, federal, state, or local, about which citizens know as little. The camera, in the hands of discerning and discriminating technicians, permitted to operate under revised canons, can bring to the American people a greatly expanded report of the activities of the courts. Such a report will be in the interest of the courts and in the interest of the public.

Should Canon 35 Be Amended?

A Question of Proper Judicial Administration

by Richard P. Tinkham • *Chairman of the Committee on Public Relations*

■ This article is a summarization of the arguments of the Bench and Bar in support of the prohibition against photography and broadcasting of trials as prescribed by Canon 35 of the Canons of Judicial Ethics. It is in reply to the arguments of Justin Miller (page 834) and J. R. Wiggins (page 838) urging a change in the Canon. Mr. Tinkham sets forth the considerations that have led the American Bar Association to retain Canon 35. His thesis is that the principle of the Canon remains valid, even though its precise language may be in part inappropriate today.

■ The Bench and Bar of this country are now engaged in what has been termed by the press "a raging controversy" with the news media concerning Canon 35 of the Canons of Judicial Ethics.¹ Representatives of the media through the American Society of Newspaper Editors, the National Press Photographers Association, the National Association of Radio and Television Broadcasters, and other organizations have launched and are relentlessly pursuing a well-planned and forceful campaign to secure a modification of the Canon. That they have made progress in this campaign cannot be denied. A number of judges permit photographing and broadcasting of trials. A considerable number of trial judges have declared themselves in favor of the proposals made by the media.

Canon 35 is not the result of a whim on the part of the Bench and Bar. It reflects a fervent desire to

protect the administration of justice against the objectionable conduct of some media representatives and the apparent inability or unwillingness of some judges to maintain the dignity of court proceedings. Flagrant examples have been the Bruno Hauptmann, Halls-Mills, Gray-Snyder, "Peaches" Browning, and other sensational trials of comparatively recent time. Thus, partial credit for the birth and growth of the principle contained in the Canon should

go to the media representatives themselves.

The media are not waiting for the Bench and Bar to modify or abrogate Canon 35. They are utilizing their great resources for the molding of public opinion in an effort to oblige the Bench and Bar to modify the Canon. At the same time they have asked that the Bench and Bar abandon or modify the Canon principally on these grounds:

1. The prohibition against photographing and broadcasting trials is a violation of the First (free speech), Sixth (public trial), and Fourteenth (due process) Amendments to the Constitution of the United States.²

2. It is unfair for the courts to exclude photographers and broadcasters while admitting the pencil reporter of the press.

1. Canon 35 of the Canons of Judicial Ethics was adopted by the House of Delegates of the American Bar Association in 1937 and amended to include the prohibition against broadcasting in 1952. It reads in part as follows:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

It is submitted that in view of technical developments in photography and broadcasting, some of the language of the Canon may be inappropriate at the present time. The 1937 version of the Canon has been officially adopted by approximately fifteen states. The 1952 amendment has been adopted by only one. Elsewhere media coverage is a question for the trial judge.

2. The term "broadcasting" includes transmission by both radio and television. It will be thus used hereinafter unless it is desired to distinguish between the two. It has been held that the Fourteenth Amendment to the Constitution of the United States imposes upon the several states the requirements of the First Amendment.

3. The development of new and modern equipment for the taking of photographs and broadcasting³ renders it unobtrusive and incapable of disturbing proceedings in court. Representatives of the media have now learned to use this equipment in a manner consistent with the dignity and decorum of court trials.

4. Each trial judge has the power and is capable of controlling and regulating conduct in his own courtroom.

The Ultimate Issue . . . Interference with Justice?

It is submitted that the issue before us does not ultimately involve constitutional questions, for free speech (which includes broadcasting) and fair trial are of equal stature under the law. Neither can transgress upon the other. The question is whether still photography and the broadcasting of court proceedings will interfere with the due administration of justice. Both the Bar and the media are agreed that if they do, they should not be permitted.⁴

We are charged with depriving the media of their constitutional rights under the free-speech and public-trial amendments to the Constitution.⁵

There is a simple answer which demonstrates the complete fallacy of this argument. In the present day, all trials are public trials except in the rare instance where media coverage would interfere with the administration of justice or affect public morals, health or safety.⁶

The courts are just as accessible to all media as they are to the pencil reporter. The broadcasters can and do gather the news in the courtroom and disseminate it many times each day through their news commentaries. No one is barred from any courtroom. The complaint is that they can't gather the news in the ways they prefer—with cameras and microphones. The media do not seek access to information. They have that. They want something more. It might be called "freedom of the lens and microphone".

The side issue as to whether a de-

fendant in a criminal case may waive his right to a public trial and that thereafter the court may exclude the public, including the media, has no place in this discussion. However, the majority rule seems to answer this in the affirmative.⁷ Civil trials are public by tradition and custom. Courts are public, and all members of the media have equal access to information. The right of free speech, or freedom of information, call it what you will, is not denied or hampered in any way.

A Revised Canon . . . The Effect on Lawsuits

Will Photography and Broadcasting Interfere with the Administration of Justice? The mere knowledge that they are being photographed or broadcast causes many people to undergo changes of personality. In commenting on whether or not photography and broadcasting in the courtroom would interfere with the administration of justice, Judge Harold R. Medina of the United States Court of Appeals for the Second Circuit in a CBS broadcast said:

I say it does, and that they constitute a psychological and very real barrier which, for all practical purposes, makes it impossible to get at the truth. And because of this I would exclude them, not only from court rooms but from any other places where analogous efforts are being made to do justice on the basis of true facts.

Let us look at what prominent representatives of the media say

about the effect of cameras on their subjects.

Ed Sullivan, of "Toast of the Town" fame, one of the veterans of the television business, said: "I'll admit it took me a long time to smile on television—two years. Up till then I was scared to death of those cameras".⁸

Jack Gould, nationally known television columnist, has remarked:

The most experienced performers in show business know the horrors of stage fright before they go on TV. This psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die. The administration of justice is more important than a few fleeting moments of fascinating TV.⁹

Sydney Andorn, well-known columnist, said:

The campaign to train cameras on court trials is smelled up by self-seekers' B.O. . . . No matter how thin we slice it there's ham in everyone of us. . . . Distracting is a mild word for TV cameras.¹⁰

Mary Margaret McBride, veteran of radio, commented in a television interview: "Radio is easy. You just sit there and nobody sees you."¹¹

Alfred Eisenstaedt, probably the best known news photographer in the country, had this to say about taking his own picture:

I'm afraid of the camera. I know how I should be photographed—low and slightly from the left, but when I took my own picture for you, I just forgot to do it that way.¹²

3. Several demonstrations by representatives of the media have shown that this new equipment can be used unobtrusively and with a minimum of distraction.

4. The Special Committee on Cooperation between Press, Radio, Bar, etc., which was appointed in January, 1936, and upon which representatives of the American Bar Association, the American Newspaper Publishers Association, and the American Society of Newspaper Editors served, made its report to the annual meeting of 1937. While there was disagreement between representatives of the bar on one hand and representatives of the press on the other as to broadcasting in the courtroom, yet the conference group did agree on certain fundamental things, among which was the following:

"We are likewise unanimous in believing that all extraneous influences which tend, or may tend to create favor, prejudice, or passion should be eliminated." [62 A.B.A. Rep. 851, 853.]

5. Judge Justin Miller of Los Angeles, formerly Associate Justice of the United States

Court of Appeals, Washington, D.C., and formerly Chairman of the Board and General Counsel of the National Association of Radio and Television Broadcasters, has said:

"Prohibition of the broadcasting of proceedings of any public trial would be a violation of the Constitution, except upon a finding, by the trial judge, that it was necessary to do so—in that particular case—to insure the orderly proceeding required by the due process clause."

6. *United Press Association v. Valente* (1954), 308 N.Y. 71, 123 N.E. 2d 777 (1954); *E.W. Scripps Company v. Parker Fulton*, 125 N.E. 2d 896 (Ohio, 1955).

7. See cases cited *supra*, note 6. It is believed the *Valente* case expresses the majority view, while the *Scripps* case expresses the view of the minority.

8. *LOOK* MAGAZINE, April 19, 1955.

9. *NEW YORK SUNDAY TIMES*, March 13, 1956.

10. *CLEVELAND NEWS*, October 14, 1954.

11. Interview with Edward R. Murrow on "Person to Person," December 3, 1954.

12. *TIME*, June 11, 1956.

I shall pass up the temptation to comment on the views of these experts from the friendly opposition, except to ask the question: "Wouldn't the effect of cameras and microphones on a reluctant, excited and excitable, inexperienced and apprehensive lay witness or party be multiplied many times?"

I believe we are entitled to concede the argument that modern cameras, microphones and film can be operated without noise, and inconspicuously. The answer to this argument is twofold. First, the damage is not done because the equipment is in plain view. The damage is done because the subject knows he is being or is apt to be photographed or broadcast. Second, I am not entirely convinced that the media are either ready or willing to use this modern equipment. In a speech to the National Press Photographers Association on June 10, 1954, J. R. Wiggins, Managing Editor of the *Washington Post and Times-Herald*, said:

The newspaper profession, I am afraid I must admit, has continued to use equipment that by its very nature causes disturbance in spite of the fact that equipment equally efficient and far less conspicuous is available. We constantly say to lawyers and judges that modern photo equipment is no more conspicuous than a pen or pencil; but we almost invariably use cameras that create real disturbance at public events.

I know that I will not be misunderstood in this audience when I say that as newspapermen we do not always conduct ourselves at public gatherings in the most inconspicuous manner. Not all the lens lice are in front of the camera. The old "front page" tradition still lingers in our business. There are enough bald-headed, cigar-smoking, visor-decked, hard-drinking city editors to keep the legend alive inside the newsroom. And on the beat there are still a few shy, timid souls who prefer, of all available positions from which to take a shot of the head table, that vantage point achieved by putting one foot on the back of a distinguished guest and the other on a banquet table.

One of the most dramatic illustrations of the effect of the TV camera on its subject was the article in a recent issue of *Life* magazine entitled: "Some Freeze-Ups on a Warm-Up".

The TV camera had been turned on the audience, and *Life* had this comment to make concerning its pictures of the contorted, grimacing subjects:

Almost everyone finds this amusing, even some of the subjects who become frightfully embarrassed. The girl shown here is confronted with the same face she sees each morning in the mirror. But with 350 people watching, she found looking at it more than she could bear.

Art Linkletter, veteran of TV, has probably had more intimate association with lay TV subjects than anyone in the business through his show "People Are Funny". The June, 1956, issue of *Coronet* magazine, in an article about Mr. Linkletter, illustrates another type of reaction to the camera as follows: "Besides, as Linkletter points out, people will do almost anything to get into the limelight."

Perhaps the most photographed person in the world is the President of the United States. One would believe that the President would soon become accustomed to the click of the camera and the flash of the bulb. During ex-President Truman's recent trip to Europe when guards in a Salzburg concert hall ousted photographers who were attempting to snap pictures of Mr. Truman, he commented: "Many times in my own life I had wished that I could have handled the press photographers as well!"

Wholly without the annoyance of the immediate presence of the photographer and the flash of the bulb, President Eisenhower is affected by the mere knowledge that he is being photographed. In requesting photographers to cease taking telephoto pictures of the President on his Gettysburg farm, Press Secretary James C. Hagerty said:

It is vitally important to the welfare and to the health of the President that he be allowed to walk around that farm without having or being conscious of telescopic lenses on him at all times.

As for the lawyer participants, it is not difficult to conjure up the impetus and encouragement that photography and broadcasting would give to that growing group who now



Richard P. Tinkham practices with his own firm in Hammond, Indiana. He has been Chairman of the American Bar Association's Committee on Public Relations since 1954 and has just completed a three-year term as a member of the Board of Governors. He is a former President of The Indiana State Bar Association and a former Chairman of the Conference of Bar Association Presidents.

practice and advocate dramatic and sensational effects with demonstrative evidence.¹³

Change the Canon... Increase the Judge's Burden

What about the judge? Ordinarily he is a fairly busy person during a trial. His responsibilities are great. If added to these he has the responsibility of policing the number of media reporters, the location of their equipment, the parts of the room that are ruled to be off-limits to still photographers, prohibiting the photographing and broadcasting of witnesses who object to it and of those parts of the trial that might affect public morals, he will be a harassed magistrate. Furthermore, most judges must be politicians whether they want to or not. Being human, certainly some of them would succumb to the temptation to use photography and broadcasting for personal and political reasons. If the

(Continued on page 884)

13. See *LIFE AND LIMB* by Robert Wallace, Doubleday and Company, Inc., 1955.



David F. Maxwell
President, American Bar Association, 1956-1957

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The President's Page

David F. Maxwell

■ It is customary at the start of a new year for a corporate body to take inventory. A quick look at ours makes us justifiably proud. Our membership is the highest in our history, standing roughly at 85,000. We have a plant and equipment conservatively valued at \$2,000,000, and our income is estimated for the current year at \$800,000.

All of this has been brought about by the abiding faith which you, the members of the legal profession, have in this Association—faith expressed by the liberality of your gifts to the building fund and faith expressed by the participation of so many of you in the most successful membership drive in the history of our Association.

It will be the purpose of this administration to justify that faith by doing all in its power to advance the legal profession. In this undertaking co-operative effort is essential. Therefore I hope that many of you will write me as soon as possible giving me the benefit of your suggestions and ideas. I am looking forward to visiting as many associations throughout the country as time will permit, and I hope that when I come to your association, you will be prepared to discuss with me freely and candidly any problems your association or the lawyers of your community have. By reason of its resources, experience and prestige, the organized Bar on the national level is in a position to aid a state or local association in obtaining objectives which might otherwise prove beyond its reach. This is the type of service we are equipped to render and you will find us most responsive to any call you care to make.

With our course thus charted, this

then will be our program:

1. To extend the Association's insurance coverage to include all of our members over the age of 55.

2. To step up our public relations program particularly in the television and radio fields.

3. To do all we can to insure the passage of legislation similar to that embodied in the Jenkins-Keogh Bill which was pending before the last Congress. This bill (H.R. 10) would provide a tax-free retirement fund for self-employed persons. Some of our members have branded this a "rich man's bill". It is nothing of the sort. It would simply put farmers, dentists, doctors, architects, lawyers and all other self-employed persons on a parity with the average workman. There is hardly a union in the country which does not have a pension plan for its members. All we are asking the Congress to do is to give us, along with all other self-employed persons, the right to set aside annually a small percentage of our income upon which the assessment of federal income taxes would be deferred until retirement. This is exactly like the plan most corporations now have and is fair and equitable. The English lawyers were granted this type of relief this year and there is no reason why we should not be.

I have assigned the task of getting this legislation through the Congress to the Special Committee on Retirement Benefits. We owe it to our families and to ourselves to make a strong co-operative effort to achieve this result, and I hope when that Committee calls on you for assistance, you will respond wholeheartedly.

4. To do all we can to secure the adoption of legislation carrying out

the recommendations of the Special Committee on Legal Services and Procedure adopted at the 1956 Mid-year Meeting of the House of Delegates. The Association achieved a great victory when the Administrative Procedure Act was adopted in 1946. This was an excellent start, but it did not pretend to offer final answers to all the questions with which it dealt. Experience has proved that there is a crying need for further improvements and refinements which the House recommends be embodied in a Code of Administrative Procedure.

In furtherance of the principle that the judicial functions of the administrative agencies should at all times be kept separate from investigating and prosecuting activities, your Committee has also recommended the establishment of one or more courts of special jurisdiction in the trade practice field with respect to certain powers now vested in the Federal Trade Commission, in the labor relations field now vested in the National Labor Relations Board, and pertaining to such other adjudicatory functions as the Congress may from time to time determine, together with the removal of the Tax Court of the United States from the executive to the judicial branch of the Government. Certain other reforms important in the public interest are also advocated, including reasonable restrictions on lay practice before administrative agencies, stricter regulation of lay practitioners and the automatic admission of lawyers to all administrative tribunals without special formalities. The Bar should present a united front in urging upon the Congress the adoption of all of the recommendations of this Committee.

5. To put additional funds at the disposal of the Committee on Unauthorized Practice of the Law so that it may afford greater assistance to state and local committees in their efforts to eradicate the practice of law by lay persons.

6. To obtain for lawyers in the Armed Forces the same status with

(Continued on page 866)

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As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ The New Executive Director

The office of Executive Director of the Association is no longer vacant; the Board of Governors, by unanimous vote, offered the post to Joseph D. Stecher. His acceptance was a source of great pleasure and satisfaction to all who know him, for no better man could have been selected.

Ever since he was elected Secretary of the Association in 1945, he has been a member of the Board of Governors and has never missed one of its meetings. In the discharge of his duties, he has been unfailingly conscientious. His opinions have been his own, and he has never hesitated to express them even though they left him standing alone. On more than one occasion, his extraordinarily retentive memory has enabled him to refresh the recollection of the Board in important particulars. He is a man of fine intellect and excellent judgment, high principles, honest and honorable in all things.

It is a delight to work with him for he is soft-spoken, friendly, genial and even-tempered.

Although he would be reluctant to admit it, because of his innate modesty, Mr. Stecher has made for himself

an enviable position at the Bar of Toledo and in all manner of civic and philanthropic activities in his home community. He is a comparatively young man with a successful private practice. For nearly thirty years, he has been in general practice in Toledo. He has been President of the Ohio State Bar Association, the Toledo Bar Association, the Child and Family Agency of Toledo, the Toledo Council of Social Agencies, the Toledo Junior Chamber of Commerce and Greater Toledo Community Chest. In 1938, he received the Distinguished Service Award of the United States Junior Chamber of Commerce. He has held high office in numerous educational and charitable organizations. He was the third Chairman of the Junior Bar Conference of the American Bar Association. He is a member of the Order of the Coif, a Republican and a Presbyterian. Ohio Wesleyan University bestowed upon him the honorary degree of Doctor of Laws in 1949. In 1937, he married Alice Louise Heesen. They have two children, Joseph Day and Sally Ann.

By education, training, experience, ability, character and personality, he is pre-eminently qualified for his new undertaking. It is refreshing and reassuring to know that his steady hand is on the tiller.

■ Canon 35 and the Broadcasters

In this issue we publish articles by Justin Miller, J. R. Wiggins and Richard P. Tinkham on the problem of news photographs and radio and television broadcasting of judicial proceedings. These articles deal with criticisms of Canon 35 of our Canons of Judicial Ethics.

Mr. Miller's article points out that the word "broadcasting" includes both radio and television broadcasting. The author makes some strong points for his thesis that Canon 35 should be revised. Radio and television, he states, would provide wide dissemination for court proceedings. There have been great improvements in broadcasting techniques since the adoption of Canon 35 in 1937. Broadcasters naturally accept the requirements of the Fifth and Fourteenth Amendments which require orderly procedure as indispensable components of a fair trial. Mr. Miller, too, accepts the idea that the broadcasting of any trial proceedings could be prohibited if the trial judge found that in the particular case there was an interference with the orderly procedure required by the Constitution.

Members of our Association who attended our Annual Meeting in Philadelphia in 1955 will recall the demonstration of "courtroom" photography at that time. Modern advances in television techniques have been astounding. High-speed films make ordinary room lighting adequate for reasonably good photographs. This development eliminates flashbulbs. Mr. Miller points out that there are some 3700 radio and T-V stations now operating in the United States and 130,000,000 receiving sets. What effect do these new conditions have on Canon 35?

Canon 35 deals with an apparent conflict between the

requirements of the Bill of Rights governing freedom of the press and those guaranteeing a public trial. None of us will deny that a trial must be orderly. Mr. Miller agrees. The basic issue is whether or not broadcasting by television or radio interferes with the orderly administration of justice. Mr. Miller presents a forcible argument to prove his point that modern radio and television broadcasting, if properly conducted, do not interfere with the orderly administration of justice.

A murder trial in Texas was recently photographed and the majority opinion of those polled indicated that the courtroom photography did not interfere with the trial itself. Another experiment carried out in December, 1955, in the courtroom of Justice O. Otto Moore related to televising and making courtroom photographs during court proceedings. Judge Moore had been appointed by the Supreme Court of Colorado as a referee to consider the Canons of Ethics, including Canon No. 35, in this connection. At the end of the experiment Judge Moore said:

For six days I listened to evidence and witnessed demonstrations which proved conclusively that the assumption of facts as stated in the Canon are wholly without support in reality. At least 100 photographs were taken at various stages of the hearing which were printed and introduced as exhibits. All of them were taken without the least disturbance or interference with the proceedings, and, with one or two exceptions, without any knowledge on my part that a photograph was being taken. A newsreel camera operated for half an hour without knowledge on my part that the operation was going on. Radio microphones were not discovered by me until my attention was specifically directed to their location. . . . There was nothing connected with the telecast that was obtrusive. The dignity or decorum of the court was not in the least disturbed.

Judge Moore concluded by recommending that "the entire matter be left to the discretion of the trial judge".

Such evidence of course is interesting, but certainly it is not conclusive. It does not justify any immediate wholesale revision of Canon 35. What is needed is further study and further evidence to test these preliminary findings. If any change is to be made in Canon 35 in the future it will only be because of intelligent, dispassionate persuasion supported by statistics, by further experiments in actual courtroom tests, and by mutual co-operation between the broadcasters, the Bench and

the Bar. The JOURNAL therefore invites the views of other lawyers on this interesting and vitally important subject.

Because of the high costs involved in telecasting, one point must be kept in mind: it is likely that only celebrated cases or sensational trials in which there is a great public interest will be broadcast. In such cases it is necessary that the broadcasters remember that the primary objective of the trial is not satisfaction of public curiosity but solely of doing justice to the parties involved and thereby to the public.

■ *Shall Anything Be Done About Motor Accident Litigation?*

What shall be done, if anything, about the vast annual grist of automobile accident cases that clog court calendars?

The latest available figures show an annual toll of 1,500,000 motor car accidents, 38,000 lives lost and 1,350,000 personal injuries—virtually all headed for some court's docket. In terms of money, payments of over four and one-half billion dollars annually are made to claimants either by way of settlements or through the uncertain medium of jury verdicts, which, we are told, often vary widely even when involving the same accident. Even so in about one third of the accident cases there is no insurance and no substantial financial responsibility.

All of these cases are predicated on someone's alleged fault, and, in most states, on complete absence of fault by the plaintiff.

Shall the rule of non-liability without fault be abolished in such cases?

Shall some method other than common law trial be adopted to improve, or at least expedite, the disposition of this tremendous number of tort cases?

These and related questions are thoroughly aired in the article in this issue by Ella Graubart entitled "A Change Is Inevitable: The Problem of Automobile Accident Cases".

She outlines the magnitude of the problems, has no doctrinaire solution, but asks for careful and competent studies to find the answer, if there be one.

Capital Punishment:

A Reaction from a Member of the Clergy

by the Reverend Lester Kinsolving

■ In the February issue of the *Journal*, Judge Evelle J. Younger, of California, discussed capital punishment, one of the oldest problems of the law. That article stirred up much interest among our readers, several of whom wrote to us about their reactions. One of the most interesting was that published here, written, not by a lawyer, but by an Episcopal clergyman who is a former prison chaplain at San Quentin. He is now Vicar of St. Philip's Episcopal Church, El Sobrante, California, and St. Thomas' Episcopal Church, Rodeo, California.

■ The February issue of the *JOURNAL* carried an interesting article on capital punishment. I am only a missionary and former prison chaplain at San Quentin, and not a lawyer. Yet I hope that this voice of the cloth may be heard—particularly since the arguments in favor of capital punishment begin with Biblical quotations:

Romans 13:1-4 "For He does not bear the sword in vain—he is the servant of God to execute His wrath on the evil doer."

In considering this passage it must first be realized that Paul was writing to Roman Christians, a number of whom were connected with the government that had given Paul citizenship, highways and in many cases protection. Paul was naturally concerned that the Christians be law abiding—but who would maintain that he meant obeying a law regarding the worship of the emperor? He stressed the fact that all authority is from God and that only in God's service does the servant of God execute his wrath on the evil doer. Paul certainly believed Jesus

to be the greatest revelation of God—and Jesus most specifically repudiated the "eye for an eye and tooth for a tooth".

The sword does not invariably mean execution. Jesus suggested (Luke 22:34) the purchase of a sword. He said also "I come to give not peace but a sword." When Peter used the sword to attack a servant of the high priest, Jesus remonstrated with him "They that take the sword shall perish by the sword." The violent action of Jesus in cleansing the temple of money changers indicates that he could use force when necessary—but there is nothing in this action which is akin to capital punishment. It rather resembles a vivid type of rehabilitation—which is fortunately the essence of modern penology.

Acts 25:11: "If then I am a wrongdoer and have committed anything for which I deserve to die, I do not seek to escape death." It is well to consider (1) Paul does not mention these things for which he deserves to die; (2) Paul did most assiduously

seek to escape death on numerous occasions—when groups of men decided that he deserved to die. As all authority is derived from God, then the only way in which he could deserve to die is by the action of God. Paul eventually became a victim of capital punishment—for reasons which few Christians would maintain as deserving of death.

It should also be remembered that Paul, for all of his inspiration and religious genius, was a product of his day. If it is to be thought that this passage justifies the supposed social corrective of capital punishment, it must be pointed out that an entire epistle of Paul's (Philemon) seems to justify the existence of slavery.

Revelation 13:10: "If anyone slays with the sword, with the sword must he be slain." This is an almost direct reference to the old Mosaic law. It is written not by Our Lord, the apostles or the evangelists, but by a sorely vindictive victim of heavy persecution who penned one of the most controversial volumes in the New Testament. As patriotism is the last refuge of a scoundrel, the Book of Revelation has become the favorite stamping ground for those (like Satan) who enjoy quoting Scripture for their own purpose. The book came very near to being excluded from the Canon of the New Testament be-

cause its inspired passages are so counterbalanced by vengeance, by obscure and cryptic messages and by Babylonian imagery.

Judge Younger gave a brilliant presentation of the two arguments. I do not know whether his arguments in favor of capital punishment are his own or those of a few of his colleagues. Notwithstanding, they seem to pose certain questions:

1. Capital punishment is maintained as a "just proportion to the enormity of the crime". The majority of murder victims sense their impending doom for a matter of seconds—if at all. The average condemned inmate of San Quentin spends two years in a four-by-twelve foot cell where he is kept for twenty-two hours a day seven days per week. Is this justice? Is it proportionate?

2. "Death [is the only terror] that holds some men in check". Apparently it holds very few potential murderers in check, because murder continues in the states which have capital punishment and it has not increased in the states which have abolished it.

3. "There is in reality no such thing as life imprisonment. The fiends are often released only to commit more crimes." This statement is contradictory. If there is no such thing as life imprisonment, then why are the "fiends" not *always* released instead of merely being *often* released? Is Judge Younger aware of the number of lifers who have died in prison—at advanced age? How many paroled murderers have repeated their crime? Could we please have some material evidence instead of generalities? Does the number of paroled murderers who repeat their crimes compare with the number who have "made good"? Is it on the other hand a microscopic minority which would indicate the wisdom and moral demand that our so-called Christian society take a chance and dispense some measure of the forgiveness of sins. Abolitionists do not ask for easy parole—nor do they feel that the parole board (adult authority) of California is made up of glib sentimentalists. (The California

Department of Corrections reports that out of 373 paroled first-degree murderers, only two were returned to prison for repeating that crime. In both cases, there was a span of at least twenty years between crimes.)

4. "A life is sacred only when it makes itself sacred; when it respects the lives and rights of others." This disastrous reservation is certainly sub-Christian. Capital punishment certainly does not respect the lives of its victims any more than did the dropping of the atomic bomb on Hiroshima. According to this argument, the lives of all Americans born prior to that day are therefore not sacred—as are those citizens of states which show their disapproval of killing by killing. As the bomb and the gas chamber are both actions of the state, all citizens seem to be accessories.

5. "Why slay the man-eating tiger and preserve the human beast"?—This question indicates a fundamental failure to recognize the difference between any human being and any beast. Granted that human beings can act like animals—failure to distinguish between them poses the question, why not execute those who murder deer?

6. "The death of the murderer does secure society against him".—"The death of the murderer" is something about which the state can never be sure. Eye witnesses can always perjure. The exact number executed by mistake is known only to God. Professor Borchard, of Yale, has an imposing list of those innocent who were convicted. A number of states know how futile it is to defer a pension to the family of a man executed by mistake. Signed confessions can be accepted fully only when all possibility of insanity or the third degree has been eliminated. Execution of the criminally insane would secure society against the most dangerous murderers of all—yet we seem to have progressed in this field.

7. "Too many persons indulge themselves in gushing sentimentalism over criminals." This point of view emanates apparently from the "treat 'em rough" school, now for-

tunately declining in its influence on penology. This school regards incarceration as being solely for the purpose of punishment, and that any attitude toward "cons" other than the treatment afforded to animals is "gushing sentimentalism"—similar to "I was in Prison and ye visited me."

8. "Those states which have abolished capital punishment without a resulting increase in murder rate, had failed for a long period prior to its final abolition to enforce the penalty effectively." This sweeping statement is submitted without any statistical evidence whatsoever. In death-penalty states, the number of homicides as compared to the number finally executed indicates that none of these states "enforce the penalty effectively".

9. "Even the most ardent advocates of life imprisonment as punishment admit the necessity to execute for a murder by a 'lifer' ". Former Warden Duffy of San Quentin does not. Neither did former Warden Lewis Lawes of Sing Sing. Neither does the acknowledged dean of American penologists, Dr. Austin MacCormick.

10. The argument in favor of capital punishment maintains that in cases where states have abolished it, there has been a restoration after a short period in which the murder rate rose. Here again is a complete lack of statistical evidence with a failure to mention the tremendous effect of the press coverage of a particularly brutal crime. One such crime given sufficient newspaper treatment can often provoke lynching not to mention a return to capital punishment.

11. "Specific cases can be cited where a murder has been planned intentionally in an abolition state." Which cases? Where can they be found? Why hasn't the homicide rate in abolition states gone sky high? Why is it that in Jackson (Michigan) State Penitentiary (Michigan being an abolition state), during the recent riot no hostage was killed? According to this argument the lifers involved

had nothing to lose. And yet no hostage was killed.

12. The presentation is concluded by pointing out that the people want capital punishment—according to the Gallup Poll! *Vox populi, vox dei?* This seems in view of history almost as difficult to accept as the reliability of the Gallup Poll. The recent news from England plus the growing agitation throughout the United States indicate among other things that more and more people are learning the facts—but that the presence in the legislature of even a few Senators who are “backwoods reactionaries” makes passage of abolition bills extremely difficult. No less than six of the principle Protestant denominations in California have passed resolutions against the death penalty. The action of the British House of Commons indicates that abolition is only a matter of time

and of education.

After presenting the case for abolition Judge Younger’s conclusion is that there is no proof that capital punishment is not a deterrent. If the experience of six states and thirty-three foreign countries is not proof, then it would seem impossible to prove anything. Certainly these facts seem to produce a great deal more proof than has been elicited in several administrations of the death penalty.

“Human nature being as it is the burden of proof seems to fall on the abolitionists.” This may be true of some human natures, but I for one have faith that when people give thought to this question *which seems so remote*—they will change the burden of proof. They will no longer justify killing because it is *thought* to be a deterrent—they will eventually demand proof that execution deters murder before they con-

done it. Even if it could be proved a deterrent (which history disclaims) perhaps a growing Christianity will then convince them that two wrongs do not make a right, that innocent men may suffer and that capital punishment does not restore the victim.

Finally the editorial on the article seems to identify the abolitionist movement with idealism and the retention movement with realism. I am glad that abolition of capital punishment is identified with the ideal—but I should hope that true idealism is linked most solidly with reality. This was the case with Jesus whose idealism was realistic enough to outlast every kingdom or state that has existed since his earthly ministry. He was a victim of capital punishment who seems to have condemned its very essence of retaliation. Hence I write—and am most grateful if you have read this far.

Books for Lawyers

REFLECTIONS OF THE LAW IN LITERATURE. By F. Lyman Windolph. Philadelphia: The University of Pennsylvania Press. 1955. Pages 83.

Mr. Windolph thinks clearly and writes faultless English. His two earlier books—*The Country Lawyer* and *Leviathan and Natural Law*—had established his reputation as an essayist of distinction and in the present volume the author fully justifies his reputation.

The volume embodies three lectures delivered on the North Foundation at Franklin and Marshall College. This Foundation provides for annual lectures on “law and related subjects”. “Trollope and the Law” is the subject of the first of the three, “Shakespeare and the Law” of the

second, and “Browning and the Law” of the third. In each case the author is chiefly concerned with a single work: *Phineas Redux*, *The Merchant of Venice* and *The Ring and the Book* are the three upon which attention is focused. Mr. Windolph’s book can be read through in an evening; and any reader, be he lawyer or layman, will find the reading a thoroughly enjoyable experience.

In commenting upon Trollope, Mr. Windolph hazards a prediction that Trollope’s novels will be read and enjoyed longer than those of either Dickens or Thackeray. *Phineas Redux* with its detailed account of the murder trial of the eponymist is certainly a human interest story, and its reflection of English criminal law and procedure in the mid-Victorian period is reasonably accurate.

Mr. Windolph’s summary of Trollope’s account of the trial is punctuated at appropriate points by references to the Canons of Ethics of the American Bar Association and by his own comments upon the conduct of a trial held before the date when the accused was permitted to testify on his own behalf.

If the reflection of the law in Trollope’s book is on the whole a recognizable likeness, it is otherwise in the case of Portia’s judgment in *The Merchant of Venice*. This is not, indeed, so much a distorted image of actual law as it is the offspring resulting from the union of drama and poetry in a jurisdiction not unlike fairy-land. Indeed Mr. Windolph’s closing paragraph suggests that perhaps it is a mistake to look at the play through a lawyer’s eyes. “You will have concluded” he observes “that I have no very high opinion of Shakespeare’s legal attainments and, in particular, that I would not favor the adoption in real life of the legal system prevailing in his enchanted country. It is true enough. Nevertheless, I want to make one point clear—I would rather have

written *The Merchant of Venice* than Justinian's *Code* and Blackstone's *Commentaries* rolled into one."

Rather reluctantly the reviewer must concede that Mr. Windolph's unfavorable estimate of Portia is justifiable. A different estimate is no doubt due to the charm which various lovely actresses have at different times imparted to her. One may be permitted, however, to record dissent from Mr. Windolph's belittling comment on her "Quality of Mercy" speech.

The lecture on *The Ring and the Book* is Mr. Windolph at his best. It combines scholarship and discriminating literary taste. The account of the seventeenth century trial of Guido and his accomplices for the murder of Guido's wife, Pompilia, is an excellent piece of work. Guido's appeal to a "higher law" than that recognized by the court leads our author into a learned dissertation upon positive and natural law and the difference between the two. Mr. Windolph suggests that Guido's invocation of natural law was, under the circumstances, equivalent to what we know as an outraged husband's reliance upon the "unwritten law" as justifying the slaying of the seducer of his wife. The reviewer is reminded of a murder trial held long ago in a Philadelphia court during which the late Judge Biddle warned counsel for the prisoner that in his court "the unwritten law is not worth the paper it is not written on". As Guido and his hired assassins had killed not only the prisoner's wife but her mother and father, it is not surprising that the appeal fell upon deaf ears. After conviction Guido appealed for clemency to the Papal "Court of Perfect Partiality". The appeal was dismissed and Guido and his hirelings were put to death.

Windolph's appreciation of Browning's great poem is just and discriminating. An illustration of the latter quality is the concluding paragraph of the Browning lecture. It follows a quotation of what Brown-

ing attributes to the Pope as his reason for denying the appeal for clemency. "As rhetoric", says Windolph, "this is superb. As poetry it is consummate. As theology I am afraid its implications are not quite orthodox. I hope with all my heart and soul that they are true."

GEORGE WHARTON PEPPER

Philadelphia, Pennsylvania

CHARLES BEARD AND THE CONSTITUTION — A Critical Analysis of "An Economic Interpretation of the Constitution". By Robert E. Brown. Princeton: Princeton University Press. 1955. \$3.50. Pages 200.

In 1913 Charles Beard wrote "An Economic Interpretation of the Constitution". Few historical studies of this century have stimulated more controversy, and even fewer have had such a widespread and lasting effect upon the thinking of students of our political institutions and the bases of the American political society. Now Professor Robert Brown of Michigan State University has written what amounts to a reply brief to Beard's brief in support of a highly limited viewpoint toward the origins of the United States Constitution. The odd thing is that it has taken so long for anyone to do what Professor Brown has now done.

The Beard thesis was that the Constitution, far from being the work of patriotic men seeking to establish a safe, just and workable structure of government for a new country dedicated to the protection of the life, liberty and the pursuit of happiness of all its inhabitants, was really the product of members of a self-seeking economic pressure group, dedicated only to the protection of their own pocketbooks. Further, Beard held that these pocketbook patriots managed to put across the structure they had created, by essentially undemocratic methods in an essentially undemocratic society, and that their efforts to achieve their selfish ends amounted almost to a conspiracy against the great

mass of the American people. To refute the Beard thesis, Professor Brown has taken the Beard interpretation step by step, and has shown that Beard's methods amount almost to a perversion of the historical method, designed to support conclusions arrived at independently of the facts to be examined. The "facts" asserted by Beard, his "analysis" of the motivation of the various prominent participants in the Constitutional Convention, and his "exposé" of the techniques used to obtain ratification from a "reluctant" body politic, are subjected to Professor Brown's scholarly and lawyer-like scrutiny, and all of them are found to be wanting. The reader is left with a sense of wonderment that Beard managed to get away with so much for so long with so many people.

The reply brief technique used by the author is effective, but it is subject to its own inherent limitations. The author's approach is essentially negative and designed to refute a point of view rather than to assert one. One finishes Professor Brown's book with no new insight into the forces that shaped the unique and astonishingly effective instrument to which we largely owe our greatness as a nation. But Professor Brown has not tried in this book to give us that new insight. Rather he has sought to lift from intelligent study of the Constitution the dead hand of the cynical Beard interpretation. In this he has succeeded remarkably well. When we finish his exposition we must return to George Washington's conclusion that the Constitution was and is "the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation, and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy". And this, after the nearly half-century of respectability which the Beard thesis has enjoyed, is an impressive accomplishment for anyone.

PHIL E. GILBERT, JR.

New York, New York

TRIAL BY ORDEAL. By Caryl Chessman. Englewood Cliffs: Prentice-Hall, Inc. 1955. \$3.95. Pages 309.

On October 17, 1955, the United States Supreme Court in a five-to-three per curiam opinion (the Chief Justice not participating) granted certiorari in the case of *Caryl Chessman v. Harley O. Teets*, Warden of the California State Prison at San Quentin, and reversed and remanded the case to the District Court for hearing.¹ Thus begins another chapter in the long and involved story of California's alleged "Red Light Bandit", a story he has told from his point of view in two books, first the best selling "Cell 2455, Death Row" and more recently in the present volume. Where it will end and who is in the right only the future will reveal; but the very fact that a Caryl Chessman can exist, that a sentence of execution imposed in 1948 has not been carried out eight years later although the condemned man is still in custody awaiting its consummation, points up a problem which is of importance to all of us. A system of justice under which such things can happen, perhaps even a society in which they can happen, demands re-examination.

This book, unlike the earlier one which dealt largely with his life before his conviction, describes Chessman's experiences during the years which he has spent in prison. For this reason it will perhaps be of less general interest but of more special interest to lawyers. The chief ground upon which he has instituted the multitudinous legal actions which have delayed the carrying out of his sentence for so many years is in the words of the Supreme Court in its recent opinion, "that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings". This

in turn he asserts resulted from the fact that (again in the words of the Court) "The official court reporter had died before completing the transcription of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him, had by corrupt arrangement, prepared the fraudulent transcript." This is of course a very serious charge if sustained. Whether or not there is any basis for it remains to be seen after the hearing on remand.²

But Caryl Chessman's point, he insists, is not that he failed to receive a fair hearing in his individual case. It is not even that he is innocent of the crimes of which he has been convicted, although he declares that he is. Here it is in his own words: "Society's crime problem is bigger than one Chessman. Accordingly, it is time society asked itself the question: Will writing this particular Chessman off now as a 'bungled job' help solve that problem?—Writing me off as a bungled job is an attempt to solve the problem I typify negatively and destructively. Garbed as an exigency of justice and a 'moral' necessity, it is actually an admission of failure. And because I haven't written off easily, a great hue and cry has gone up that there is something wrong with our whole system of administering justice."

To this extent it seems to me that Caryl Chessman's point is well taken. If he is guilty, he should long since have suffered the penalty which the law provides. If he is innocent, he should not have been compelled to spend eight long years in prison while that fact was being established. Punishment, it has been said, is effective only in proportion to its certainty and immediacy, and Caryl Chessman's story makes it apparent that under existing procedures there is possibly a case where it is neither certain nor immediate. If this situation can be remedied, then in the future perhaps there will be fewer Caryl Chessmans.

WALTER P. ARMSTRONG, JR.
Memphis, Tennessee

EIGHTH TAX INSTITUTE MAJOR TAX PLANNING FOR 1956. UNIVERSITY OF SOUTHERN CALIFORNIA SCHOOL OF LAW. Edited by John W. Ervin. Albany, New York: Matthew Bender & Co. 1956. \$14.50.

The problem of the staggering growth in the complexity of the law has not been answered by specialization, for specialties themselves have become exceedingly complex. The tax field, for example, encompasses such a wide scope that even experienced tax specialists frequently feel overwhelmed by the demands in their field. The problem places a premium on efficient organization of legal materials in readily usable form for the needs of clients, government and courts. Learning, after all, is only a tool.

The Eighth Annual Institute on Federal Taxes of the University of Southern California Law School has approached federal taxation in this spirit. The lecturers at the Institute last fall in Los Angeles were asked to present specific forms and clauses wherever the subject matter permitted. The Institute has taken pride in being the first to attempt this. Of course, "how to do it" tax articles and services have now become common, although sometimes suspect. The Institute proceedings are not in that category. They constitute a sincere effort to organize tax knowledge around legal forms and documents. To a considerable extent, the Institute has been successful in this endeavor.

Knowledge of the basic tax principles and appreciation of the major tax problems are a prerequisite to categorization of tax learning. Thereafter, the development of forms seems as good a method of categorizing tax knowledge as any other, for most clients' problems are ultimately resolved in legal documents. And, a satisfactory legal document does reflect proper organization of tax learning. In fact, too much detailed and unorganized tax knowledge can be an obstacle to the

1. 350 U. S. 3, 100 L. ed. 3, 76 S. Ct. 33.

2. Since this was written, Chessman's contentions have been held to be without merit by the United States District Court for the Northern District of California, 138 F. Supp. 761.

preparation of a document, almost as much of an obstacle as tax ignorance.

Jacob Rabkin, in his opening article on "The Function and Use of Forms in Tax Planning" emphasizes that "there is a delicate skill in applying this knowledge [of both local tax law and federal tax law] to a specific transaction. And there is an equally significant skill in reducing the specific transaction to the rigid shape of a legal document." While the end product reflecting that skill is most important, lawyers should not overlook the self-educational aspect of developing and criticizing forms. The relevance of many provisions of the Internal Revenue Code appears in sharper focus in this process.

This point is particularly illustrated by the articles on partnerships and trusts which occupy about half the book. These subjects especially lend themselves to this treatment. The forms in those parts are helpful and the discussions even more so. Particularly commendable are provisions on partnership buy and sell agreements by Richard H. Forster and Arthur B. Willis, short-term and controlled trusts by Walter L. Nossaman and trusts for minors by Hover T. Lentz.

The articles on corporations are not so liberally studded with forms as might be expected. John O. Paulston discusses the sale of a corporate business; William L. Kumler, the reorganization of a smaller corporation into a larger one; David W. Richmond, the division of a corporate business; and Leon L. Brown, stock purchase agreements in closely held corporations. In this section, Irving I. Axelrod and James S. Kostas consider at length "collapsible corporations" under Section 341.

Other articles deal with pension and profit-sharing plans by Richard H. MacCracken, residential subdivisions by Milton S. Huberman, and property settlement agreements by Donald T. Rosenfeld and Edward M. Raskin.

Although it is not a "bread and butter article", the article by Laur-

ens Williams, Assistant to the Secretary of the Treasury, on "Preparation and Promulgation of Treasury Regulations under the Internal Revenue Code of 1954" should be read by lawyers in order to appreciate the extraordinary job which is being done to the great credit of the legal profession. Mr. Williams has been an active member of the Tax Section of the American Bar Association, as have most of the authors in this book. They demonstrate that the Tax Section has contributed a great deal to tax legislation and practice in recent years.

This volume is an excellent guide to some of the major problems and solutions in many tax areas. It does not purport to be, nor is it, comprehensive, even in the subjects it covers, since it is not a textbook but a series of articles prepared for an annual tax institute. It offers legal forms as a valuable clue to organizing the data in the tax field. This method has its limitations, and some of the authors wisely avoided rigid adherence to the formal objective. The method certainly must be supplemented by other methods, but a valuable step has been taken. The book maintains the high standard set by its predecessors and deserves study by lawyers who are practicing in these fields.

HARRY K. MANSFIELD

Boston, Massachusetts

LEGISLATION — CASES AND MATERIALS. By Frank C. Newman and Stanley S. Surrey. Englewood Cliffs, New Jersey: Prentice-Hall, Inc. 1955. \$9.50. Pages xvii, 729.

This book, the latest of the Prentice-Hall Law School Series, has its origins in mimeographed materials used by the authors for several years at the Harvard and California law schools. Its excellent quality attests the value of this sort of preliminary experience in teaching with the materials. One can also suppose that this method of preparation permitted the authors to utilize the most recent materials available, since the book contains many items which

only recently left the headlines of the daily press.

The primary emphasis of the book is on the legislative process, based largely, but not exclusively, on congressional materials. Chapters on "Lobbying Legislation", "Legislative Procedures", "Legislative-Administrative Relations", and two chapters on "Legislative Investigations" occupy the first three quarters of the book. Two chapters on "How To Draft Statutes" and "How To Interpret Statutes" occupy the remainder. In this respect, as the authors acknowledge, the arrangement varies from other legislation casebooks. There is much to be said, however, for the authors' point of view that when space is limited, it is the materials on drafting and interpretation which should be reduced. As they point out, skill in reading and using statutes is taught equally well in connection with other courses in which statutes are important, such as taxation. The course in "Legislation", by illuminating the mechanics of the legislative process, can supply its due contribution if it makes the students aware of the manifold extrinsic aids to interpretation, and gives them some idea of the need for their *qualitative* analysis.

From the point of view of the law school curriculum, this reviewer can say only that the materials in this book should be made available to law students before they graduate, and that he cannot see where else they would be dealt with, save for a lick and a promise, perhaps, in constitutional law. From the point of view of the practitioner, however, I can assert confidently that the book contains much that is of current value. The book, in the week that it has been in my possession, has twice supplied useful and pertinent materials helpful in answering a current question. They were, moreover, materials which could have been run down by independent research only at the price of an inordinate amount of time and effort.

(Continued on page 871)

Review of Recent Supreme Court Decisions

George Rossman

EDITOR-in-CHARGE

Aliens . . .

deportation

■ *Jay v. Boyd*, 351 U. S. 345, 100 L. ed. (Advance p. 732), 76 S. Ct. 919, 24 U. S. Law Week 4335. (No. 503, decided June 11, 1956.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Affirmed.*

This was a habeas corpus proceeding to test the validity of denial of an alien's application for discretionary suspension of deportation. It was alleged that the denial of the application was unlawful because it rested on confidential, undisclosed information.

The petitioner, a British subject, had lived in the United States since 1921. Between 1935 and 1940, he was a member of the Communist Party. Because of his Communist record, he was ordered deported in 1952 under the Immigration and Nationality Act of that year. He sought discretionary relief from the Attorney General, who is empowered to grant suspension of deportation by Section 244(a)(5) of the Act. A hearing was held before a special inquiry officer who found Jay to be qualified for suspension of deportation, but the officer decided that the case did not "warrant favorable action" in view of "certain confidential information". The Board of Immigration Appeals dismissed an appeal. The petitioner sought a writ of habeas corpus in a federal district court. The writ was denied and the Court of Appeals affirmed. The review procedure followed was one set up by the Attorney General to effectuate the statutory provisions.

The Supreme Court affirmed speaking through Mr. Justice REED. The Court declared that there was nothing in the statute to require the Attorney General "to give a hearing

with all the evidence spread upon an open record" in exercising his discretion to suspend deportation. The statute leaves the determination as to suspension to the Attorney General, said the Court, and the grant of the suspension is a matter of grace.

The CHIEF JUSTICE, in a dissenting opinion, disagreed that the statute gave the Attorney General "unfettered discretion" in deciding on suspensions. The petitioner was entitled to an administrative hearing, this opinion argued, and a hearing meant an opportunity to rebut the evidence against him.

Mr. Justice BLACK also wrote a dissenting opinion which argued that the use of anonymous information was unconstitutional.

Mr. Justice FRANKFURTER wrote a dissenting opinion which took the position that the Attorney General could not delegate his discretionary power without providing a fair hearing, which in his view had not been given here.

Mr. Justice DOUGLAS wrote a dissenting opinion which argued that Congress had implicitly provided for a hearing on suspensions of deportation and that any hearing under our law must mean a full and open disclosure of all the information considered.

The case was argued by Will Maslow and John Coughlan for petitioner and by John V. Lindsay for respondent.

Antitrust law . . .

fair trade

■ *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305, 100 L. ed. (Advance p. 707), 76 S. Ct. 937, 24 U. S. Law Week 4367. (No. 448, decided June 11, 1956.) *On appeal from the United States District Court for the Southern District of New York. Reversed and remanded.*

This was a Sherman Act suit brought by the Government against the drug firm of McKesson and Robbins to enjoin the firm's "fair trade" agreements with independent wholesalers who handle its brand and who are in competition with McKesson, which also has a large volume of direct sales to retailers. McKesson claimed that its fair trade agreements were exempted from the Sherman Act by the Miller-Tydings Act and the McGuire Act. The district judge denied the Government's motion for summary judgment, and the case proceeded to trial before another district judge. The trial ended with a dismissal of the complaint and the Government appealed directly to the Supreme Court under the Expediting Act.

The Court's opinion reversing and remanding was delivered by the CHIEF JUSTICE. The opinion was careful to point out that the Government was not attacking the "vertical" fair trade agreements between McKesson and retailers of McKesson products, and that the only question related to the agreements between McKesson and the independent wholesalers with whom it is in competition. The contracts with the latter, the Court thought, fell squarely within the ban of the Sherman Act, since they were a form of price-fixing; the Court cited the familiar rule that price-fixing is illegal *per se*. In enacting the Miller-Tydings Act and the McGuire Act, said the Court, Congress showed no disposition to change the traditional *per se* doctrine. The Court also pointed to the language of the former act which provides that it "shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices . . . between persons, firms, or corporations in competition with each other".

Reviews in this issue by Rowland Young

McKesson had argued that in contracting with the independent wholesalers, it had acted solely as a manufacturer selling to buyers rather than as a competitor of the buyers. To this the Court replied that "the statutes provide no basis for sanctioning the fiction of McKesson, the country's largest drug wholesaler, acting only as a manufacturer when it concludes 'fair trade' agreements with competing wholesalers".

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER and Mr. Justice BURTON, wrote a dissenting opinion which argued that the Court was giving an artificial construction to the Miller-Tydings and McGuire Acts. The very purpose of those statutes, the dissent declared, was to legalize the elimination of price competition in the sale of the branded products.

The case was argued by Ralph S. Spritzer for the United States and by John P. McGrath for the appellee.

Appeals . . .

what is a "final order"?

■ *Parr v. United States, Parr v. Rice*, 351 U. S. 513, 100 L. ed. (Advance p. 836), 76 S. Ct. 912, 24 U. S. Law Week 4289. (No. 320, decided June 11, 1956.) *On writs of certiorari to the United States Court of Appeals for the Fifth Circuit. Affirmed.*

Parr, a prominent political figure in Laredo, Texas, was indicted in the Corpus Christi Division of the United States District Court for the Southern District of Texas for willfully attempting to evade federal income taxes. The District Court granted his motion to transfer the case to the Laredo Division of the District, finding that Parr could not obtain a fair trial in Corpus Christi because of local prejudice against him. The Government protested that it would be under "a severe handicap" in trying Parr in Laredo, but the District Court deemed itself without power to transfer the case elsewhere than Laredo without Parr's consent. Thereupon, the Government obtained a new indictment

in the Austin Division of the Western District of Texas and moved for leave to dismiss the first indictment. The Corpus Christi court granted leave to dismiss; Parr appealed to the Court of Appeals, which dismissed on the ground that the order appealed from was not a final one.

The Supreme Court affirmed, speaking through Mr. Justice HARLAN. The Court reasoned that, if the Corpus Christi indictment was considered by itself, Parr could not appeal from dismissal of the indictment because he was not aggrieved by the dismissal. On the other hand, if the Corpus Christi and Austin indictments were considered as parts of a single prosecution, then dismissal of the Corpus Christi indictment was not a final order, since the sentence is the final judgment in a criminal case.

The Court also disposed of another aspect of the case which had been filed as No. 202 on the Court's Miscellaneous Docket. This was a motion by Parr for leave to file an original petition in the Supreme Court for writs of mandamus and prohibition to the two District Courts in Texas, designed to require trial in Laredo. The Court refused to issue the extraordinary writs, saying that the power to issue them is discretionary and sparingly exercised, and the issuance here would thwart the policy against piecemeal appeals.

The CHIEF JUSTICE wrote a dissenting opinion in which he was joined by Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice CLARK. The dissent took the position that Parr had a right to be tried in Laredo or not at all, and therefore he was aggrieved by dismissal of the first indictment which the dissenters regarded as a final order.

The case was argued by Everett L. Looney and Abe Fortas for petitioner and by Gray Thoron for respondent.

Judgments . . .

finality

■ *Sears, Roebuck and Company v. Mackey*, 351 U. S. 427, 100 L. ed.

(Advance p. 780), 76 S. Ct. 895, 24 U. S. Law Week 4322. (No. 34, decided June 11, 1956.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed.*

This case began with an antitrust action filed by Mackey making multiple claims against Sears, Roebuck and Company for a variety of conduct allegedly prejudicial to Mackey's commercial ventures. The District Court expressly directed that judgment be entered for Sears on two of the claims but not on all of them. Sears moved to dismiss Mackey's appeal to the Court of Appeals, contending that the District Court's decision was not a final decision within the meaning of 28 U.S.C. §1291 and that the Court of Appeals therefore had no jurisdiction. The Court of Appeals upheld its jurisdiction, and the sole question before the Supreme Court in the present case was the finality of the District Court's judgment.

The Supreme Court's opinion affirming was written by Mr. Justice BURTON. The Court found the basis for its decision in Rule 54(b) of the Federal Rules of Civil Procedure. The Court explained that before adoption of the Federal Rules in 1939, the District Court's action dismissing part of the claims but not all would not have been a final judgment and would not have been appealable. Rule 54(b) modified this "single judicial unit" theory, but left unimpaired the statutory concept of finality prescribed by Section 1291. A further problem had arisen, however, the Court went on, since it was difficult to determine which of several multiple claims were sufficiently separable to qualify for relaxation of the unity principle, and sometimes the time for taking an appeal would expire earlier than the losing party foresaw. Prudent counsel then began to take immediate appeals in all cases of doubtful appealability, and the volume of appellate proceedings was increased. In 1948, Rule 54(b) was modified to eliminate this difficulty by providing that the district court might en-

ter a final judgment on one or more claims in a multiple action only after making an express determination that there was no just reason for delay. In other words, as the Court put it, the District Court is used as a dispatcher, and is permitted to determine the appropriate time when each final decision is made upon one or more multiple claims.

In this case, the District Court had made such a certification of finality, and the Court sustained the appeal, saying that the District Court had not abused its discretion and holding that Rule 54(b) was not an unauthorized extension of Section 1291.

The case was argued by Walter J. Rockler for petitioner and by Edward I. Rothschild for respondent.

Judgments . . . finality

■ *Cold Metal Process Company v. United Engineering and Foundry Company*, 351 U. S. 445, 100 L. ed. (Advance p. 789), 76 S. Ct. 904, 24 U. S. Law Week 4325. (No. 76, decided June 11, 1956). *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Affirmed.*

This was another multiple-claims action in which the District Court entered a judgment disposing of but one claim. Again, the sole issue was the appealability of that judgment under Section 1291 of 28 United States Code. The issue was comparable to that in No. 34, *supra*, and the Court upheld the jurisdiction of the Court of Appeals on the same reasoning as that used in No. 34.

In this case, however, the unadjudicated claim arose out of the same transactions and occurrences as the adjudicated claim. Cold Metal sought to block the appeal on the ground that an unadjudicated counterclaim was still to be settled in the District Court.

The opinion of the Supreme Court was delivered by Mr. Justice BURTON. The litigation involved a contract for a patent license and had been in the courts for more than

twenty years. The Court's opinion summarizes the procedural steps and the findings of the District Court and Court of Appeals in the lengthy case, and announces its agreement with the Court of Appeals that this is the "very kind of thing Rule 54(b) was written to provide for". The Court declared that its opinion in the *Sears* case was dispositive of this case.

Mr. Justice FRANKFURTER, joined by Mr. Justice HARLAN, wrote an opinion concurring in No. 34 and dissenting in No. 76. The dissent took the position that the judgments in No. 34 were appealable because one of the counts appealed from involved transactions separate from those remaining to be litigated, while the other count appealed was an interlocutory order denying an injunction appealable under Section 1292(1) of 28 U.S.C. In No. 76, the dissent argued, the counterclaim, which remains unlitigated, is based in substantial part on the transactions involved in the main litigation and hence there is no appealability.

The case was argued by William H. Webb for petitioners and by Jo. Bailly Brown for respondent.

Railroads . . . through rates

■ *Denver and Rio Grande Western Railroad v. Union Pacific Railroad*, *Union Pacific Railroad v. United States*, *United States v. Union Pacific Railroad*, *Washington Public Service Commission v. Denver and Rio Grande Western Railroad*, *Union Pacific Railroad v. Denver and Rio Grande Western Railroad*, *United States v. Denver and Rio Grande Western Railroad*, 351 U.S. 321, 100 L. ed. (Advance p. 717), 76 S. Ct. 982, 24 U.S. Law Week 4360. (Nos. 117, 118, 119, 332, 333 and 334, decided June 11, 1956.) *Nos. 117, 118 and 119, on appeal from the United States District Court for the District of Nebraska. Affirmed in part and reversed in part. Nos. 332, 333 and 334 on appeal from the United States District Court for the District of Colorado. Reversed.*

These cases involved an order of

the Interstate Commerce Commission which established through railroad rates for the carriage of certain goods over the Denver and Rio Grande Western and the Union Pacific Railroads. The order was issued after lengthy hearings on Rio Grande's complaint that Union Pacific had agreements with other lines under which goods could be shipped to and from the Pacific Northwest at joint through rates, while Rio Grande could carry goods to and from this area only at the higher combination rates—that is, the sum of the local rates. The result, according to the complaint, was that Rio Grande was effectively barred as a connecting carrier for shipments to and from the Pacific Northwest. Acting under powers granted by Section 15 (1) of the Interstate Commerce Act, the Commission ordered Union Pacific to establish through routes for specified commodities and to establish joint rates the same as applied on its own and other connecting lines. The order applied, however, only to specified commodities and to a limited geographical area. In arriving at its decision, the Commission had to consider the restrictions on its power imposed by Section 15 (4) of the act, generally referred to as a provision against making a railroad (in this case, Union Pacific) short-haul itself. Section 15 (4) provides that before the Commission establishes a through route that requires a railroad to short-haul itself, it must find that the new route "is needed in order to provide adequate, and more efficient or more economic, transportation". Rio Grande contended that Union Pacific had already created through routes on the lines in question and that Section 15 (4) therefore did not apply. The Commission had rejected this contention and issued the limited order.

Neither railroad was satisfied, and both challenged the order—the Rio Grande before a three-judge District Court in Colorado and Union Pacific before a three-judge District Court in Nebraska. The Colorado court held that there was no sub-

stantial basis for the Commission's finding that no through route existed, and remanded the whole case to the Commission, reasoning that since Section 15(4) did not apply, the Commission might make the order much broader. The Nebraska court accepted the finding that no through route was in existence and upheld the Commission's finding that through routes were needed for specified commodities to certain points, but refused to sustain the order for all points on the lines that were proposed by the Commission.

The Supreme Court, speaking through Mr. Justice BLACK, sustained the Commission on all points. Taking first the Colorado court's ruling, the Court pointed out that establishment of a through route is ordinarily voluntary, and the existence of one depends upon the circumstances—the test being “whether the participating carriers hold themselves out as offering through transportation service”. The Court noted that Union Pacific had apparently at one time had a through route over

the lines in question, but had dropped the joint rates in amended tariffs published in 1906 and 1912, although it had not formally declared the through routes closed. Although there has been a “trickle” of through shipments over the routes since, the Court said, the evidence before the Commission was “not such as to compel it to find that the Union Pacific held itself out as offering through service over the Rio Grande lines”.

As for the Nebraska court's holding, the Court ruled that that court had erred in narrowing the scope of the Commission's order. That court had disagreed with the Commission and disallowed the through routes and joint rates on shipments that did not require transit services (transit services are services such as feeding livestock or processing shipments in transit). The Court had agreed with the Commission that the through rates were necessary for perishable shipments, which are diverted in transit as markets are found and sales are made. Without

joint through rates, said the Court, diversion as a practical matter is impossible if the shipper must reassign his goods at the high combination rates.

Mr. Justice FRANKFURTER wrote a dissenting opinion which argued that the Commission had not followed the policy laid down by Congress in Section 15(4). He would have remanded the whole case to the Commission for clarification.

Mr. Justice HARLAN dissented with Mr. Justice FRANKFURTER, and said that he would affirm the judgment of the Nebraska court noting that he would consider the Commission's order limited to establishing through routes and joint rates on shipments destined initially to intermediate points on the Rio Grande.

The cases were argued by Frank E. Holman for the Rio Grande, Elmer B. Collins for the Union Pacific, Robert W. Ginnane for the United States, Robert L. Simpson for the Washington Public Service Commission, and Bert L. Overcash for the State of Nebraska.



President Gambrell as honor guest of the Mexican Bar Association in Mexico City, D.F., addressed its banquet on June 4 and enjoyed several days of its hospitality.

Its Board of Governors, left to right (seated): Rafael Alcerreca Bordes, Secretary; President Gambrell; Manuel G. Escobedo, President; Jesus Rodriguez Gomez, Vice President; Jorge Hernandez Duque, Sub-Treasurer; (standing): Juan Manuel Cossio y Cosio, Xavier Creixell del Moral, Secretary; Manuel Lizardi Albarran; Jose Candano; Guillermo Lopez Velarde; Rodolfo Batiza, Secretary; and Guillermo Gallardo Vasquez.

What's New in the Law

The current product of courts,
departments and agencies

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Constitutional Law . . . segregation

■ A three-judge panel of the United States District Court for the Middle District of Alabama, with one judge dissenting, has held that racial segregation is unconstitutional in intrastate bus transportation.

Thus the Court lined up with the Court of Appeals for the Fourth Circuit, which has declared in *Flemming v. South Carolina Electric & Gas Company*, 224 F. 2d 752 (41 A.B.A.J. 1041; November, 1955), appeal dismissed 76 S. Ct. 692, that the separate but equal doctrine can no longer be followed as a correct statement of the law, whether in public schools, public recreational facilities or intrastate common-carrier transportation.

The dissenter protested that the separate but equal theory of racial segregation, as propounded by the Supreme Court in 1896 in *Plessy v. Ferguson*, 163 U. S. 537, was still law in the field of intrastate public transportation, albeit the *School Segregation* cases, 347 U. S. 483, had wiped it out in public education. He said it would be a "pernicious implication" to extend the *School Segregation* cases without precise pronouncement by the Supreme Court, and he pointed out that the Supreme Court cited only a procedural case in dismissing the appeal in *Flemming*.

But the majority, tracing the long series of cases in which the Supreme Court, even prior to the public-school ruling, was striking down

segregation, declared that *Plessy v. Ferguson*, which was itself a transportation case, "has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation within the City of Montgomery." The Court remarked that even a statute can be repealed by implication and that certainly "a judicial decision, which is simply evidence of the law and not the law itself, may be so impaired by later decisions as no longer to furnish any reliable evidence."

The Court then concluded that Alabama statutes and Montgomery ordinances requiring segregation of races in common-carrier buses violated the due process and equal protection clauses of the Fourteenth Amendment.

(*Browder v. Gayle*, United States District Court, Middle District of Alabama, June 5, 1956, Rives, J.)

Criminal Law . . . double jeopardy

■ By a four-to-three decision, the Supreme Court of New Jersey has decided that a criminal defendant was neither subjected to double jeopardy nor denied the benefits of the doctrine of collateral estoppel by being convicted of the armed robbery of one of four persons held up in a tavern, after he had been acquitted of the same offense as to the other three.

Four barroom patrons had been robbed. The defendant was indicted for the crime against three of them, but upon trial, the three failed to identify him, while the fourth made identification. The jury acquitted the defendant. He was then indicted for armed robbery against the fourth patron, who identified him again at

the second trial, while the other three testified on the defendant's behalf. This time the jury convicted.

The defendant's claim was that he had been subjected to double jeopardy in violation of the state constitution, but that even if not, the outcome of the first trial, being based upon the same circumstances as the second, was *res judicata*, or, as the Court more precisely preferred to term it, collateral estoppel.

The Court denied the double jeopardy argument. It said that the contention failed under either the "same evidence" or the "single act" test, because different evidence was necessary to prove the crime against each person and because there was a separate and different act—the forcible taking of the victim's property—as to each of the four.

The three dissenters declared that the case fitted the rationale of New Jersey cases that where the "fact prosecuted" is the same in both prosecutions, though the offenses differ in "coloring and degree", there is prior jeopardy. They thought, too, that the doctrine of *res judicata* should apply since the ultimate issuable fact had been determined in the first trial. "Unless this be so," the minority averred, "then the citizen in such circumstances is subject to successive prosecutions until a convicting jury is found."

(*New Jersey v. Hoag*, Supreme Court of New Jersey, May 14, 1956, Wachenfeld, J., 122 A. 2d 628.)

Criminal Law . . . state sedition laws

■ Two states have bowed to the decision of the United States Supreme Court in *Pennsylvania v. Nelson*, 350 U. S. 497 (42 A.B.A.J. 560; June, 1956), that Congress has pre-empted the field of sedition legislation, leav-

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

ing the states unable to enforce their own sedition laws when the conduct upon which the prosecution is based is the same as that proscribed by federal statutes.

On the basis of the *Nelson* ruling, the Supreme Judicial Court of Massachusetts has directed the dismissal of indictments in two cases. Although one of the indictments charged a conspiracy to overthrow only the Commonwealth of Massachusetts, and was grounded on a state act, the Court read the Supreme Court's ruling in *Nelson* as carrying the implication that the Smith Act, 18 U.S.C.A. §2385, taken together with the Internal Security Act of 1950, 50 U.S.C.A. §781, and the Communist Control Act of 1954, 50 U.S.C.A. §841, indicated Congress' intention "to occupy exclusively the field of sedition at least where the offense charged is a federal crime of the type charged in that case, even though alleged as a conspiracy against the state".

The Court was careful, however, to point out that it thought there is a limit to *Nelson*. "We do not wish to be understood as saying there can never be any instance of any kind of sedition directed so exclusively against the state as to fall outside the sweep of *Pennsylvania v. Nelson*", it declared. "If it is to be said that there can never be such an instance, it must be said elsewhere."

(*Massachusetts v. Hood and Massachusetts v. Gilbert*, Supreme Judicial Court of Massachusetts, May 3, 1956, Qua, C.J., 134 N.E. 2d 12 and 13.)

■ In Kentucky, the Court of Appeals of that state was faced with a case in which the defendant had been convicted under an indictment charging a felonious advocacy by word or writing of the expediency of physical violence to bring about a political revolution to change or modify the governments of both the United States and Kentucky. The indictment was based on a Kentucky statute.

The Court reversed the conviction with the observation that the Kentucky statute is quite similar to the Pennsylvania law involved in

Nelson and that the teaching of that case was that Congress had occupied by pre-emption the field of prosecutions for sedition.

But, as in Massachusetts, the Court was chary not to close the door completely. "To be certain of making ourselves clear," it said, "we now state this opinion does not foreclose the possibility of a prosecution by the commonwealth of the crime of sedition directed exclusively against the Commonwealth of Kentucky."

(*Braden v. Kentucky*, Court of Appeals of Kentucky, June 22, 1956, Sims, J.)

Divorce . . . divisibility

■ Cases in two state supreme courts have illustrated again the divisible divorce doctrine spelled out by the United States Supreme Court in *Estin v. Estin*, 334 U. S. 541, and fortified during the last term in *Armstrong v. Armstrong*, 350 U. S. 568 (42 A.B.A.J. 561; June, 1956).

In Oregon, the Supreme Court of that state has granted a wife enforcement of the alimony and property settlement portions of her California interlocutory divorce decree, although in the meanwhile the husband had obtained a divorce in Nevada after substituted service on the wife.

The Court found that the Nevada court lacked personal jurisdiction of the wife; therefore the Court did not have to recognize the Nevada divorce as terminating the wife's alimony and property rights as found by the California court.

There was some confusion as to whether the wife had made a personal appearance in the Nevada action. She had filed an answer and appeared and testified. But the Court noted that despite this the Nevada decree recited that she had made but a "special answer" and that she had been defaulted. Thus, the Court said, it had to be bound by the Nevada decree's own recital that the Nevada court lacked personal jurisdiction.

But even without this, the Court declared, it could reach the same conclusion because the issues of ali-

mony and property settlement rights were neither made an issue nor litigated in the Nevada suit. This being true, the Court concluded, there could be no charge that Oregon was not giving full faith and credit to the Nevada decree.

(*Leuty v. Leuty*, Supreme Court of Oregon, June 6, 1956, Perry, J., 298 P. 2d 207.)

■ In Wisconsin, the Supreme Court of that state has ruled that a wife, who had obtained a divorce from her husband in Washington on constructive service, could have the matters of child custody, alimony and child support payments determined in an action in Wisconsin, where she had obtained personal service on her former husband.

At the time of the Washington divorce decree, the husband had taken the child to Wisconsin, leaving the trial court in Washington without authority to issue any custody and support order. The decree was silent as to alimony, because there was no personal service on the defendant.

The Court declared that when a wife obtains a divorce on the basis of only constructive service, the right to alimony continues until it is adjudicated, and that the decree of divorce in such a proceeding destroys only the marital *res* and does not bar a subsequent action for alimony.

A decree in a constructive-service divorce case, the Court continued, establishes nothing more than that the marriage relationship is destroyed. It added that there would be no distinction between a domestic or foreign decree. The Court concluded there could be no question of full faith and credit, because the second forum gives full faith and credit to the first's decree insofar as the decree goes.

(*Pollock v. Pollock*, Supreme Court of Wisconsin, June 5, 1956, Steinle, J., 77 N.W. 2d 485.)

Evidence . . . skeletons

■ Skeletons in the courtroom have given the Appellate Court of Illinois, Fourth District, a chance to look at the law of demonstrative

evidence.

In one case, the trial court had permitted the plaintiff's medical witness to use a plastic model of a human skeleton to show the proper alignment of bones in the pelvic area, after having shown the displacement of those bones as disclosed by an X-ray of the plaintiff. The doctor also used the skeleton to explain muscular arrangement and how the weight of the upper torso is transmitted to the legs.

The defendant contended this was error, on the ground it was unnecessary to an understanding of the issues, was gruesome and tended to arouse the jury's emotion rather than explain anything.

The Court held that whether demonstrative evidence is proper must rest in the sound discretion of the trial judge, subject to review. The Court said it would not hold that a skeletal model may never be used, but merely that the model must be used to actually explain some relevant issue in the case. And in the instant case the Court found no error.

The relevancy and explanatory value, the Court continued, must also be within the discretion of the trial judge, which discretion, to curtail abuse, is subject to review as to the use made of the model. "If it appears that the exhibit was used for dramatic effect, or emotional appeal, rather than factual explanation useful to the reasoning of the jury," the Court remarked, "this should be regarded as reversible error, not because of abuse of discretion, but because actual use proved to be an abuse of the ruling."

(*Smith v. Ohio Oil Company*, Appellate Court of Illinois, Fourth District, March 5, 1956, Scheinman, J., 134 N.E. 2d 526, 10 Ill. App. 2d 67.)

■ In another case, decided two days before, the Court disapproved another use made of a skeleton. In this case the trial judge had permitted not only the use of a skeleton, but also the production of surgical instruments used in an operation performed on the plaintiff. A doctor was permitted to demonstrate the use of the instruments.

Here the Court drew the line. Although adhering to the rule in *Smith v. Ohio Oil Company*, the Court said the demonstration in this case compelled a different conclusion, and remarked that surgical demonstrations are improper. "To permit an unlimited use of such demonstrations of operative technique with surgical instruments is not conducive to a fair and impartial consideration of the proper issues presented", the Court declared.

(*Winters v. Richerson*, Appellate Court of Illinois, Fourth District, March 3, 1956, Culbertson, J., 132 N.E. 2d 63, 9 Ill. App. 2d 359.)

Fair Trade . . . trading stamps

■ Fair-trading manufacturers have been told by the United States District Court for the District of Massachusetts that they cannot have their fair-trade contracts judicially enforced against non-signers as long as they permit signed-up retailers to give trading stamps to purchasers of price-fixed items.

The Court ruled that the giving of trading stamps amounted to a trade discount and that equity would not grant relief to the manufacturer against one discount-giver while the manufacturer acquiesced in other retailers' trading stamps.

The non-signer provisions of the Massachusetts fair-trade law were held valid by the Massachusetts Supreme Judicial Court recently in *General Electric Company v. Kimball Jewelers, Inc.*, 132 N.E. 2d 652. In the instant case, the Colgate-Palmolive Company sought an injunction against a non-signing discount house. The defense was that the manufacturer was not entitled to an injunction since it did not enforce its agreements against all retailers, particularly those giving trading stamps on purchases of price-fixed items.

The Court remarked that the "defendants are using the trading stamp situation as a fortuitous circumstance to escape what otherwise would be an inevitable injunction," but the fortuitous circumstance was

fortuitous enough to prevent an immediate injunction. The Court thought the plaintiff had made an honest mistake of law in not knowing that trading stamps violated fair-trade agreements, and indicated that it would award an injunction when a showing was made that the manufacturer no longer assented to the practice.

The manufacturer had argued that the discount encompassed in the use of trading stamps was nothing more than a discount for paying cash, and that it therefore did not amount to a reduction in price and was not proscribed by the fair-trade act. But the Court held that trading stamps added up to more than this: they constituted also a trade discount for quantity purchases.

(*Colgate-Palmolive Company v. Max Dichter & Sons, Inc.*, United States District Court, District of Massachusetts, June 8, 1956, Aldrich, J.)

■ The Supreme Court of Tennessee has declared unconstitutional a statute prohibiting gasoline retailers from giving trading stamps and premiums.

The statute, after requiring posting of gasoline prices, made it unlawful for the retailer to "give or promise any actual, prospective, contingent, immediate or future benefits, concessions, discounts, refunds, premiums or gratuities. . . ."

This was beyond the police power of the state, the Court said; it was protecting other retailers rather than the public. "So long as the operator's business does not offend the public morals and work an injustice on the public, its constitutional right to pursue on equal terms to that allowed to others in like business is beyond question, even though his methods may have a tendency to draw trade to him to the detriment of competitors", the Court concluded.

A like statute was struck down by the Supreme Court of Alabama in *Alabama Independent Service Station Association v. McDowell*, 6 So. 2d 502.

(*State v. White*, Supreme Court of Tennessee, March 9, 1956, Prewitt, J., 288 S.W. 2d 428.)

Real Estate Law . . . *tenancy by entirety*

■ Tramping through a judicial forest, the Appellate Court of Indiana has held that the heirs of a tenant by the entirety who killed his wife and then committed suicide are entitled to the real estate owned by the decedents.

Recognizing that American courts are in a state of considerable confusion when it comes to the matter of disposition of joint tenancy real estate when one owner takes the life of the other, the Court noted that the states are evenly divided. Some rule that, regardless of the homicide, the survivor takes the property. Some channel all or one half of the property to the heirs of the victim, either directly or through a constructive trust.

The Court in the instant case declared the question was one of public policy of the state, and failing to perceive any indication to the contrary, decided, with one judge dissenting, that the ordinary rules of real property law should govern. Therefore title vested in the husband, who survived the wife by less than an hour, and passed to his heirs. The Court stated that a declaration of public policy would have to come from the legislature, not it.

The Court found inapplicable a statute providing that "a person who shall have been legally convicted of intentionally causing the death of another . . . shall . . . become a constructive trustee" of property acquired from the decedent's estate, because a tenant by the entirety does not acquire an interest from the other's estate. But even if applicable, the Court added, the statute would not control since the husband did not survive to be "legally convicted."

(*National City Bank of Evansville v. Bledsoe*, Appellate Court of Indiana, April 23, 1956, Royse, J., 133 N.E. 2d 887.)

Torts . . . *interference with employment*

■ Twenty-three plaintiffs formerly employed in the motion picture industry have been ruled out of court

in their multi-million action against a group of motion picture producers and distributors, two members of the House Committee on Un-American Activities and an investigator for the Committee.

The plaintiffs were writers, actors, actresses, a story editor and a stagehand. They had two things in common: either they had invoked protection of the Fifth Amendment when asked by the Committee whether they were or ever had been members of the Communist Party, or, after having been termed Communists by other witnesses before the Committee, they had refused to appear at all.

The complaint alleged that the defendants had joined together in an agreement "to desist and refrain" from employing anyone who pleaded the Fifth Amendment or refused to appear before the Committee, and that the defendants had published and circulated a list of persons falling into those categories. The defendants' agreement, the complaint charged, resulted in the plaintiffs being refused and excluded from employment in the professions to which they had devoted the major portions of their lives. Each plaintiff sought \$2,500,000 damages and an injunction.

Sustaining the trial court's dismissal of the suit, the California District Court of Appeal for the Second District read the complaint as one sounding in tort for the wrongful interference with future or prospective contract or business relations. The Court found the complaint, being thus premised, fatally defective because it did not allege, nor did it appear from anything else, that such contract or employment relationships would otherwise have blossomed.

The Court noted that none of the plaintiffs made a showing in their complaint that they were employed in the motion picture industry at the time the alleged agreement among the producers and distributors was made. Since their employment terminated before the agreement charged in the complaint, the

Court continued, the inference would be that their continued non-employment was unconnected with the alleged agreement, in the absence of pleading otherwise.

The Court could not swallow the plaintiffs' allegations that they were being excluded from employment because they refused to answer questions "concerning their political affiliations, associations and beliefs". Rather, the Court averred, the Committee's questions concerned "their membership in 'a conspiratorial and revolutionary junta' [quoting from the concurring opinion of Justice Jackson in *American Communications Association v. Douds*, 339 U. S. 382] one of whose objectives is the overthrow of our government by force and violence, a malignant force which menaces the very existence of the government". No one was investigating the political beliefs of anyone, the Court said.

(*Wilson v. Loew's Incorporated*, California District Court of Appeal, Second District, June 11, 1956, Vallee, J., 298 P. 2d 152.)

Torts . . . *right of privacy*

■ Three states have recently dealt with right-of-privacy cases.

In Ohio, the Supreme Court of that state had its first opportunity to embrace the doctrine, although lower Ohio courts have held that the right existed. The Court declared that since "both reason and authority are convincingly in favor of recognition of the right, it would seem that Ohio, too, should not hesitate to take the definite step of approving this salutary and progressive principle of law."

The Court then approved application of the doctrine to a case in which a debtor sued a collection agency that had pursued a concerted program of harassment against her to collect its client's debt. On the point of the application of the doctrine to the particular case, three judges dissented.

The Court acknowledged that a creditor has a right to take reasonable action to pursue his debtor and persuade payment, but it ruled

that it was unreasonable for a creditor, as represented by a collection agency, to conduct a campaign of harassment and torment, the chief feature of which was numerous telephone calls at all hours, both to the debtor and her employer.

(*Housh v. Peth*, Supreme Court of Ohio, March 14, 1956, Weygandt, C. J., 133 N.E. 2d 340.)

■ In Iowa, the Supreme Court of that state has for the first time recognized an action for invasion of the right of privacy. The Court said that "the modern doctrine of the right of privacy is a development of the common law to fill a need for the protection of the interest which a person has in living without unwarranted publicity".

But the Court refused to allow the suit with which it was presented to stand. The action was commenced by the parents of an eight-year old boy whose mutilated and decomposed body had been found in a field about one month after he disappeared. A picture of the body was published in a newspaper, and the parents sued the paper.

The plaintiffs conceded that their son's disappearance and the subsequent location of his body were legitimate and privileged news, but they insisted that photographic depiction of the body went beyond those limits.

The Court ruled that the privilege to invade privacy when one becomes involved in a newsworthy event extended to the picture. While the matter of taste might be involved, the Court said, the public had a legitimate news interest in the appearance of the body, and that the appearance could be depicted "by words or photographs or both."

Three judges dissented on the ground that the publisher's privilege under such circumstances is not absolute and that at least the plaintiffs' complaint should not be dismissed without the opportunity to present any proof.

(*Bremmer v. Journal-Tribune Publishing Company*, Supreme Court of Iowa, May 9, 1956, Oliver, J., 6 N.W. 2d 762.)

■ But the Supreme Court of Wis-

consin has stuck by its earlier decisions that there is no right-of-privacy action in that state. And the Court's pronouncement came in a suit offering a case of privacy about as private as one would want: the plaintiff complained that the proprietor of a saloon photographed her while she was in the ladies' rest room of the establishment.

The Wisconsin Court has taken the attitude that it could not create an action for invasion of the right of privacy; it would have to be done by the legislature. In 1951 and 1953 bills to create a limited action failed to pass the legislature. Thus, the Court said, it was compelled to conclude that the right does not exist in Wisconsin.

(*Yoeckel v. Samonig*, Supreme Court of Wisconsin, April 3, 1956, Gehl, J., 75 N.W. 2d 925.)

Trial Practice . . .

forum non conveniens

■ A New York court has dismissed, because of the doctrine of *forum non conveniens*, an action for breach of contract involving two French residents in which the contract was made in France and allegedly breached in France.

The plaintiff claimed that he was retained by the defendant to negotiate a contract with Saudi Arabia for the maritime shipment of oil. He contended that he had accomplished this, with the help of bribes paid to Saudi-Arabian officials, but that the defendant refused to pay the agreed compensation and commission. The plaintiff had already commenced an action on the same circumstances in France, but his suit had been dismissed.

The Supreme Court of New York County dismissed the complaint on the ground that it was a *forum non conveniens*. Pointing out that both litigants were residents of France, the Court indicated that the suit should be pursued there, and that matters of proving foreign law by experts, non-availability of witnesses in New York, language barriers and the congesting of New York courts were factors weighing against trial of the case in New York. The Court

held that the doctrine of *forum non conveniens* applied with equal force to contract actions as to tort actions.

The Court also rejected an argument that the defendant was a resident of New York because his naturalized wife maintained two houses and a motorboat there.

(*Catapodis v. Onassis*, New York Supreme Court, New York County, Special Term, April 4, 1956, Gold, J., 151 N.Y.S. 2d 39.)

Trusts . . .

charitable

■ The Appellate Court of Illinois for the First District has cleared the way for the Art Institute of Chicago to build an administration building with funds left to it in 1905 in a "monument fund".

A testator bequeathed \$1,000,000 in trust to the Institute, with the provision that the income from the fund be used by it for the "erection and maintenance of enduring statuary and monuments . . . in the parks, along the boulevards, or in other public places within the City of Chicago, Illinois, commemorating worthy men or women of America, or important events in American history".

In 1933 a court decree construed "monument" to include a memorial building and authorized the Institute to erect a building in a certain location. The present case arose on the Institute's suit for authority to place the building in a different location and to use it as an administration building.

The Court had little difficulty in granting this request, but it was met by the petition of the National Sculpture Society to intervene, on the ground that sculptors as a class had an interest in the suit. But the Court, adhering to the rule that where charitable trusts are involved only the state has an interest, denied the petition. The Court emphasized that the rule was salutary because it prevented "vexation, delay and expense" caused by individuals seeking to promote a private interest.

(*Art Institute of Chicago v. Castle*, Appellate Court of Illinois, First District, April 2, 1956, Burke, J., 133 N.E. 2d 748, 9 Ill. App. 2d 473.)

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keffe • Editor-in-Charge

ADMINISTRATIVE LAW: Two former chairmen, a professor of administrative law and a member of the Tax Bar, write their opinions on the Administrative Court proposed by the Hoover Commission and its Task Force in a symposium issue of *The George Washington Law Review* (Vol. 24, No. 6, June, 1956), "An Administrative Court of the United States", by Professor J. Forrester Davison, traces the earlier attempts of various groups to create a separate administrative court and gives a brief analysis of the Hoover Commission recommendations. "Should the Judicial Character of the Tax Court Be Recognized?" by Daniel M. Gibbon considers the desirability of formally recognizing the separate judicial character of the Tax Court and the feasibility of so doing by incorporation into an Administrative Court. "The Case Against the Trade Regulation Section of the Proposed Administrative Court", by former Chairman Robert E. Freer presents his criticisms of the new structural change which would be brought about by the Administrative Court. "An Administrative Labor Court; Some Observations on the Hoover Commission Report", by former Chairman Guy Farmer, compares the present procedures and practices of the NLRB with the proposed Labor Section of the Court. The article should be of interest to all those whose practice includes appearances before the affected agencies. Address: The George Washington Law Review, 720 20th Street, N. W. Washington 6, D. C. Single copy price: \$1.00.

BANKRUPTCY: For a timely and excellent piece blocking out the problems raised by Sections 60, 67 and 70 of the Bankruptcy Act when an automobile dealer becomes bankrupt, see "Bankruptcy and the Automobile Dealer" by Charles E. Melvin, Jr., a member of the *North Carolina Law Review's* board of editors. This is an outstanding student effort and deserves the compliment the *Review* pays it of publishing it as a leading article (Vol. 34, No. 3, April, 1956, pages 312-335; address The North Carolina Law Review at the Law School in Chapel Hill, North Carolina, and send \$1.25).

COURT REFORM: On April 19, 1956, Judge Harold R. Medina, of the United States Court of Appeals for the Second Circuit, gave the 15th Annual Benjamin N. Cardozo lecture at the House of The Association of the Bar of the City of New York. The lecture is published in the May, 1956, issue of that Association's magazine, *The Record*. (Write to the Association for a copy, no price stated.) There may be better public speakers, but your editor has never heard any better than Harold Medina. This speech I am told was interrupted over five times by great applause from his audience. Reading it you will see why. The good Judge gave battle for the American Bar Association's 1937 plan for the selection of judges. Under that plan, the Governor fills vacancies from a list furnished by disinterested citizens, subject to recall by the voters at the next election. Pointing out that upstate New York

is Republican and downstate Democratic, Judge Medina said "the political leaders do the selecting of the judges and nobody else has anything whatever to say about it", page 233. And he quoted from a New York Crime Commission Report of 1953 that showed that out of 199 political leaders in the City of New York in 1952 some fifty-seven or 29 per cent were employed in the courts. This report stated that out of seventy-six such leaders, then or previously employed, 50 to 72 per cent were non-lawyers. The Judge also paid his hearty disrespect to New York's antiquated and out-moded Civil Practice Act, as the intellectual monstrosity it is. In this connection, mentioning that he taught procedure twenty-five years, he called upon New York's Temporary Commission of the Courts to adopt the Federal Rules and upon the Court of Appeals of the State of New York to blaze the path for reform. He declared that the reluctance of New York's highest court "to foster or participate in procedural and court reform" was New York's most formidable roadblock to progress. He then said what Arthur Vanderbilt and many others have been saying for years that "there must be one and only one head" of the court system and "he must have power commensurate with the dimensions of the task in hand". The Judge calls his piece "For Whom the Bell Tolls" from "one of the sermons of the Dean of St. Paul's because I have heard the tolling of the bell for some little time and it tolls for thee and for me", page 223. What a speech!

FEDERAL TORT CLAIMS ACT: As those of us who read *Indian Towing Company v. United States*, 350 U. S. 61, know, in 1956 the law under the Federal Tort Claims Act was radically changed, and we are in for a new era when claims against Uncle Sam will be bigger and better. Robert Gerwig, remembered by this writer as a callow youth but good student, now Chief

of the Military Affairs Division in the Judge Advocate General's Section in Third Army Headquarters at Fort McPherson, Georgia, writes a fine piece entitled "A Decade of Litigation Under the Federal Tort Claims Act" in the April, 1956, issue of the *Tennessee Law Review* (Vol. 24, No. 3, pages 301-321). If you are so fortunate as to have a tort claim against your Government, you will want this splendid study of Bob Gerwig's. (Write Tennessee Law Review at the Law School at Knoxville, Tennessee, and send \$1.50).

INTERPOSITION: The whys, the wherefores and the constitutional background of interposition are discussed most interestingly in the second issue of the *Race Relations Law Reporter* (April, 1956, Vol. 1, No. 2, pages 437-447). This new magazine, published by Vanderbilt Law School under a grant from the Ford Fund, sells for only \$2.00

for six issues or a dollar for one. It is a great contribution in that it packs into one place so much of the voluminous literature on the segregation issue. (Write the *Race Relations Law Review* at Vanderbilt Law School, Nashville 5, Tennessee).

LAWYERS: Since, unlike old soldiers, all lawyers die, required reading for all of us who assume the responsibility of liquidating a deceased brother's law business is the piece entitled "The Death of a Lawyer" in the April, 1956, issue of the *Columbia Law Review* (Vol. 56, No. 4, pages 606-619, Kent Hall, Columbia University, New York 27, New York; price: \$1.25 per single issue). The commentator discusses such varied problems as the liability of the estate if pending cases are not sued within the period of the statute of limitations and the need for a tolling statute to protect the client

whose lawyer falls ill and dies. Of course, the right of the deceased to fees, the disposition of his practice and the ethics of the profession are also examined.

SELF-INCRIMINATION: There is no subject more interesting than that perennial, self-incrimination. *Kentucky Law Journal* devotes its spring, 1956, issue to the subject (Vol. XLIV, No. 3). Professor Ray Moreland, of Kentucky Law School, writes on the history of the privilege. James R. Richardson, of the Lexington, Kentucky, Bar, writes on the scientific evidence aspect and powers to investigate. Charles L. Calk of the law review staff, on congressional hearings and Professor E. G. Trimble, of the Political Science Department of Kentucky University, on congressional investigations. (Write the *Kentucky Law Journal* at the law school in Lexington, Kentucky, and send \$2.00).

The President's Page

(Continued from page 847)

respect to rank and compensation as is presently granted doctors and dentists.

Our efforts to accomplish these objectives will in no wise detract from the activities of the American Bar Foundation. The work of that organization in the field of public service will be continued at an accelerated pace. Already three important projects have been successfully launched with two others in the offing. The first of these involves a survey of the administration of criminal justice. As this goes to press the field investigation phase of this project will have been completed in Wisconsin and will be underway in Kansas and Michigan. This is being financed by the Ford Foundation.

The second involves a review of the Canons of Professional and Judicial Ethics by a Special Committee of the Foundation. The Special Committee has already submitted its preliminary report to the Board of Directors of the Foundation which has approved the blueprint for its *modus*

operandi. The Committee will now undertake a research study to determine the experience of the profession in actual practice under the existing Canons of Ethics. The expense of this survey will be defrayed from the income of the Foundation realized from the contributions of individual lawyers.

The third major project contemplates the annotation of the Model Corporation Code and Model Non-Profit Corporation Act with reference to constitutional and statutory provisions, bibliographies of texts and law review articles and discussion of leading cases. The study will embrace provisions of corporation statutes in the forty-eight states and the District of Columbia. Funds for this purpose have been raised from private sources.

The two new projects authorized by the Board of the Foundation at the request of Committees of the American Bar Association involve:

1. A study of the problems of unauthorized practice including a compilation of state and local statutes, agreements and statements of prin-

ciples between bar associations and lay groups, as well as a compendium of recent complaints, answers, decrees and opinions in unauthorized practice of law cases; and

2. A survey of judicial and administrative procedures in the various states in areas relating to the mentally ill. The purpose of this study will be to ascertain whether the rights of "life, liberty and property" of the mentally ill are adequately protected.

This in brief is our program for the ensuing year. Do you have any suggestions with respect to any phase of it or are there other worthy objectives which you believe we should undertake?

The past administration, under the dynamic leadership of E. Smythe Gambrell, has done a good job. I only hope this administration will do as well. At any rate I approach the responsibility of the Presidency deeply grateful for the high honor you have conferred upon me, and dedicated to devoting, God willing, the next eleven months to your service.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The Lawyers' Part in Law Reform by George F. Curtis

■ A capital fact about the work of the modern lawyer, be he practitioner, teacher or judge, is the quantity of legislative material with which he must deal. Not many years ago the solution of most legal problems could not be found in the decided cases without resort to the statute book. The periods in history when the legislature had been active were rare; the reigns of the first Edward and of the Tudors were customarily looked upon as exceptional for the reason that much legal reform had been effected in those periods through the agency of parliament,—in the one a nascent parliament and in the other a compliant one. Even the legislation of those times—such landmarks as the Statutes of Quia Emptores and De Donis, the Statutes of Uses and of Wills—became so completely interwoven with the fabric of the common law over the years as largely to lose its character as a prime source of law.

Until recently, the legislature confined itself, when it infrequently essayed legal reform, largely to peripheral amendment. Under this regime, the law was the product for the most part of professional development. It grew and was shaped by the practices of lawyers and the decisions of judges.

Nowadays this position is almost exactly reversed. The legislature is today the principal source of new law. The extent of the change is obscured at times by the circumstance that what frequently takes place is not the amendment of existing law—a reform coming directly to the notice of the profession in the course of the working day—but the removal of many situations from ordinary legal procedures. Even the law of tort and of contract, which Dicey could instance as affected by

statute only fractionally, is coming more and more under the heavy hand of the legislative process. Nearly everywhere compensation for injuries arising out of industrial accidents is outside the range of the common law entirely; and there are not wanting voices which urge that claims arising out of motor vehicle accidents—that staple of cause lists on the common law side everywhere—be similarly taken from the jurisdiction of the ordinary courts. Already, in truth, many of these claims do not reach the law courts or a lawyer's office, but are settled by a process of adjustment within the organization of the insurance industry—a result accounted for partly by modern insurance legislation. In the field of contract many of the services upon which the average citizen relies—the public utilities—are controlled by extra-judicial bodies. For the most part employer and employee relationships no longer fall under the classical rules of contract but are governed by special techniques of settlement, many of them statutory in origin. The reforms embodied in the nineteenth century property legislation are being overshadowed by the spread of planning legislation and measures of public housing, rent restriction and other forms of property control.

It would be small labor to extract from the literature of the law an impressive list of complaints about the form, the language and even the content of statutes. We have, as Maitland once put it, "an inveterate dread of legislation". The older position may have been different, but for at least two centuries now lawyers have, on the whole, either not been persuaded that legislation is an apt means of improving the law or, paradoxically, have believed that

the legislature is not likely to interest itself in correcting those parts of the law most in need of reform. This antipathy towards the labors of the legislature has caused the profession, among other things, to stand aside somewhat from the initiation of legal reform and to take far less part in shaping the law by the legislative process than in seeing to its proper development by the judicial process. The close study that goes into the preparation of an argument to be presented to a court, the anxious canvass, in legal periodicals and oral discussion, of judgments as they appear in the law reports, the numerous definitive studies of legal doctrine in text books and monographs are not normally part of the apparatus—*mutatis mutandis*—which accompanies the preparation, passage and operation of a statute.

Lately there are signs that this situation is changing and that the profession as such is taking a more active part in legislative change. The clearest sign of this is that a large part of the work of our various bar associations, both national and local, is being taken up with investigation into the existing law with a view to proposing amendments. Each year a considerable crop of recommendations for legislative change emerges from the proceedings.

These developments are indicative of the impact of the age of legislation on the legal profession. Yet the pace of legal change continues to outdistance our participation in it. A limiting factor is that much of what is brought forward by our various professional groups is fragmentary and accidental, depending in large part on the interest and experience of those under whose notice a situation calling for the review of existing rules comes. Commonly it will be the decision of a case by the application of old and established rules to new conditions which will be seen by everyone to lead to inconvenient results. At other times a practitioner will come across a situation which he considers merits a change in the law and be moved to bring it to the attention of the prop-

or authorities; or a bar committee will do likewise, drawing on the accumulated experience of its members.

But the discovery of weakness in our legal system, as matters now stand, is largely haphazard. The same is true of the proposal of appropriate remedies. It largely depends on the inclination and knowledge of those who happen to have charged themselves with the question. Failing a more systematic treatment of the subject, the disposition, thoroughly sound in the circumstances, is to seek a purely *ad hoc* solution. How an amendment proposed under such conditions will fit into the general body of the law, what its implications beyond the purview of its immediate object will be, these and other questions must be allowed to await further testing in experience. This however is to run the risk of further inconvenient and unjust results, which, while never absent when change is made, is much heightened when legislative amendment proceeds from unsystematic origins.

Considerations such as these are turning more and more thought to the need for legal research. The law is not served well in this respect and suffers in comparison with most of the other disciplines. Why this should be so is somewhat puzzling particularly when it is borne in mind that law is one of the learned professions. It may partly be accounted for by the circumstance that a great deal that goes on as part of the daily work of the profession would, in other fields, bear the title "research". The preparation of an opinion and of an argument, both call for research, much of it painstaking and exact in the extreme. But the labors of the advocate are written in sand and once a case is over they perish from sight. Again, many judgments represent profound research by their authors and the counsel who have assisted them to their conclusions. But this study and research is related to the judicial development of the law and depends for its direction on the accidents of

litigation. It leaves the legislative process untouched and has neither the continuity nor the completeness possessed by research in the natural sciences.

Everyone welcomes with full heart the advances that medical science has made in the last century; what is not as often borne in mind is that standards of medical care were not always as they are now. Upon the skill in research of our physicists, we are told, our bare existence hangs. Yet, as one of their number has said about the state of his discipline not so many years ago: "It is common knowledge that since the turn of the century the physicist has passed through what amounts to an intellectual crisis forced by the discovery of experimental facts of a sort which he had not previously envisaged, and which he would not even have thought possible."

In no sense can legal research claim this urgency. This scarcely is reason for its almost complete neglect. In international law few would deny that the need for a fertility of ideas is clamant; and in a domestic society which seeks to make itself over so largely by legal enactment there must be concern that little is being done to apply to legal problems the methods of experimental inquiry which have proved so fruitful in other disciplines.

Several ways suggest themselves by which legal research may be encouraged. In Canada, we might be wise to take a leaf from the book of our American confreres and establish a bar center in Ottawa similar to the one that the American Bar Association has recently completed in Chicago. A bar center, besides serving the administrative needs of the Association, would be a focal point for rallying support to a program of research. It not infrequently occurs that each year following a reconstitution of the Sections at the annual meeting valuable time is lost fixing on suitable topics for investigation and study. The treatment of various subjects tends therefore to be uneven. The work of the Sections

would be much aided if it were supplemented by continuing inquiry by a research staff which could keep itself current with studies made by the Sections from year to year and prepare basic material for the use of the Sections and Sub-sections throughout the country. By this means also the Sections could be kept in touch with legal developments in other jurisdictions. The value of a comparative approach to legal problems has been increasingly recognized in recent years. Solutions found workable in one legal system are often suggestive of promising lines of attack on like problems in another.

One of the principal means of forwarding research in the natural sciences is the gathering of young men and women at research schools and institutes to pursue post-graduate work. These students receive generous financial assistance. Much of the experimental work could not proceed without their services, and it is not uncommon for them to make important contributions to knowledge. Legal science offers no comparable picture. Law students do not usually proceed beyond their first degree in law and they have little inducement to do so.

The most pressing need in this respect is for more post-graduate scholarships. Our legal friends in the United States share our lament that little is being done in legal science as against the natural sciences; but their provisions for post-graduate legal study outrange ours. This disparity merits the careful attention of our respective professional bodies. Up to the present, there has been wanting a clear voice from the profession that legal research has a vital role to play in today's world. The medical profession, by contrast, has been unceasing in urging the claims of medical research and has a well-formed appreciation of how medical research serves its professional interests.

In England, the setting up of the Institute of Advanced Legal Studies shows an awareness of a need for

better facilities for research. The late Lord Atkin, with others, tirelessly urged that there should be a center in the home of the common law to which scholars from all parts might come and share their knowledge. A recent comment by the Institute's Director, Sir David Hughes-Parry, underlines the worth attached to legal research by one close-

ly in touch with the situation: "A general study of the recent planning and nationalising legislation indicates that many advantages would have flowed had there been more Clinical Legal Research on several of the problems raised by the Legislation in its present form." (Journal of the Society of Public Teachers of Law, Vol. I. (N.S.) at page 254).

Observations such as this clearly point to a present-day need which is well within the capacity of the profession to meet.

This article is a condensation of a paper given at the Commonwealth and Empire Law Conference in London, July, 1955, and printed in UNIVERSITY OF BRITISH COLUMBIA LEGAL NOTES, Volume II, Part 4, March, 1956. The author is Dean of the Faculty of Law, University of British Columbia and, during the past year, has been a visiting professor at the Harvard Law School.

Regional Meetings Program Prospers

■ Another highly successful year of American Bar Association regional meetings will be concluded October 10 to 13 when lawyers from the Mid-Atlantic states of Delaware, Maryland, North Carolina, Pennsylvania, Virginia, West Virginia and the District of Columbia gather for an attractive four-day program in Baltimore. R. Carleton Sharretts, Jr., is general chairman of the meeting, headquarters for which will be the Lord Baltimore Hotel.

This will be the third regional meeting of this calendar year, all arranged through the Association's Regional Meetings Committee under the chairmanship of Charles S. Rhyne, of Washington, D.C. Others of the 1956 series were held in Hartford, Connecticut, April 13 to 16, when attendance exceeded one thousand persons, and in Spokane, Washington, May 31 to June 2, with more than eight hundred members of the profession from the Pacific Northwest attending.

While it was not the largest in terms of total registrations, the Spokane sessions were considered exceptionally successful in view of the relatively small number of lawyers in the region and the great distances many registrants had to travel in order to be present. Dean Smithmoore P. Myers, of Gonzaga University Law School, was general chairman of the Spokane meeting, which

presented a well-balanced schedule of events with emphasis—in the case of the professional program—on demonstrations of trial tactics and discussions of new developments in tax and mineral law and in judicial administration, all calculated to be of particular value to practicing lawyers. A considerable number of lawyers from Canada and Alaska participated in the Spokane meeting.

Lawyers throughout the mid-Atlantic region—members of the Association and non-members alike—have been invited to come to Baltimore for the October sessions and Chairman Sharretts has reported substantial early registrations. One of the outstanding speakers will be Assistant Secretary of State George B. Allen, close friend of President Eisenhower. General Nathan F. Twining, Air Force Chief of Staff, has been invited to appear on the program. There will be a full complement of workshops and seminars on the practice and theory of law.

Registrations for the Baltimore meeting may be made through Chairman Sharretts at 201 Title Building, Baltimore 2, Maryland.

It was just ten years ago that the Association's Constitution was amended to provide for regional meetings as part of the Association's continuing program of activities and of continuing legal education. Previously, occasional regional meetings

had been held as an activity of the Section of Bar Activities.

However, it was not until 1951 that the present pattern of regular regional meetings was established and since then fourteen have been held, the Baltimore session to be the fifteenth. No fewer than two have been held in a single year and in 1955 the schedule was increased to four.

Following is a list of cities and dates for regional meetings which have been held under auspices of the Association since 1951:

- 1951: Atlanta, Georgia, March 7-10.
Dallas, Texas, April 16, 17 and 18.
- 1952: Louisville, Kentucky, April.
Yellowstone National Park, June.
- 1953: Omaha, Nebraska, April 30, May 1 and 2.
Richmond, Virginia, May 3-6.
- 1954: Atlanta, Georgia, March 3-6.
Portland, Oregon, May.
- 1955: Phoenix, Arizona, April 13-16.
Cincinnati, Ohio, June 8-11.
Minneapolis-St. Paul, Minnesota, October 12-15.
New Orleans, Louisiana, November 27-30.
- 1956: Hartford, Connecticut, April 15-18.
Spokane, Washington, May 31, June 1 and 2.
Baltimore, Maryland, October 10-13.

OUR YOUNGER LAWYERS

William C. Farrer, Secretary and Editor-in-Charge, Los Angeles, Calif.

■ Two of the outstanding J.B.C. affiliate units are the Junior Bar Sections of the Bar Association of the District of Columbia and of the State Bar of Iowa. J.B.C. Executive Council members, Paul R. Madden, of Washington, D.C., and G. Arthur Minnich, Jr., of Carroll, Iowa, have submitted to your editor a summary of the annual reports of each of these units which we are pleased to publish.

Report of District of Columbia Junior Bar Section

Chairman Richard H. Mayfield, of Washington, D.C., reports that the real work of the Junior Bar Section is carried on by fifteen committees.

The Administrative Law Committee, under Chairman Bruce G. Sundlun, is revising the *Administrative Law Manual* which the Section published in 1950. The Civic Affairs Committee, under Chairman Samuel Green, sponsors a thirty-minute talk to District of Columbia high school classes studying United States government on problems relating to the administration of justice, with particular emphasis on the duties of citizens as jurors and witnesses. Each such class visits the United States Courthouse, where they witness a part of a selected trial, hear a discussion of the grand jury system from a member of the staff of the United States Attorney's Office, view the civil and criminal clerks' offices, the United States Court of Appeals Courtroom, the Ceremonial Courthouse, quarters for jurors and other points of interest in the courthouse. Thirteen high schools are participating and approximately 2450 students have received the benefit of the program this year.

The Group Hospitalization Committee, under Chairman Paul R.

Madden, brought participation in the group hospital and surgical insurance plan up to 75 per cent of membership.

The Legal Aid Committee, under Chairman Dickson R. Loos, has continued its program of providing a senior law student to assist members of the Bar who are assigned by the court to represent indigents accused of crime. Thirty-one student assistants have received assignments under this program.

The Membership Committee, under Chairman George H. Buschmann, has enrolled 201 new members in the Junior Bar Section, with present enrollment in the Section of 602.

The Placement Committee, under Chairman Richard R. Nicolaides, keeps a current file of applicants for legal positions which is available to all prospective employers. The Press Relations Committee, under Chairman Samuel S. D. Marsh, has succeeded in obtaining considerable press coverage of various Junior Bar Section activities and the Program and Activities Committee under Chairman George Herbert Goodrich has presented an outstanding series of monthly events as follows: September, picnic at Kensington Recreation Center; October, luncheon addressed by Judge John A. Danaher; November, Thanksgiving cocktail party; January, luncheon addressed by Supreme Court Justice Harold H. Burton; February, Washington Birthday cocktail party; March, luncheon addressed by Judge Edith H. Cockrill; April, Junior Bar night at the Bar Association of the District of Columbia; May, "new admittee" luncheon; and June, annual meeting luncheon.

The Public Information committee under Chairman Ruth Joyce

Hens has produced and presented a half-hour radio program once each week throughout the year on radio station WWDC in Washington, D.C. Heard on Sunday evenings and known as the "District Round Table", the program presents discussions and debates on numerous questions of a public and legal nature of interest to the community. The Committee on Relations with the Junior Bar Conference, under Chairman Walter F. Sheble has participated actively in organizing the American Bar Association Special Membership Drive. The Washington, D.C. chairman for the drive, James R. Stoner, and his team enlisted 612 new American Bar Association members under 36 years of age, and the District has been recognized as the top J.B.C. metropolitan jurisdiction in the campaign.

The Committee on Relations with Law Schools, under Chairman Dale Jernberg, organized and supervised the operation of the inter-law school moot court competition in which the law schools at Georgetown, George Washington, Howard and American Universities participated and has sponsored lectures on specialized legal subjects to groups of law students in the District of Columbia.

The Speakers Committee, under Chairman J. Bruce Kellison, has worked closely with the Civic Affairs Committee and the Committee on Relations with Law Schools. *The Young Lawyer* staff, under editor Edwin S. Nail, has published three issues of *The District of Columbia Young Lawyer*, which reports the progress of Committee and Section activities and stimulates increased participation in Section affairs.

The Committee on Standardized Jury Instructions, under Chairman Paul R. Commelly, has continued revising the standardized jury instructions for District of Columbia Courts, and another special committee, under Chairman John M. Bixler, has undertaken the task of compiling the laws and regulations governing "housekeeping" functions of a law office, including in summary

form the rules applicable to withholding from wages, minimum wages and maximum hours of employees, depreciation allowable for tax purposes on the usual items of equipment in law offices, the rules to be followed in obtaining admission to practice for one case or for all purposes in the District of Columbia and neighboring jurisdictions.

Iowa Junior Bar Activities Reported

During the year 1956, the business of the Junior Bar in the State of Iowa under the leadership of Chairman Ned Willis, of Perry, was conducted by the Directive Council consisting of a member from each of the twenty-one Judicial Districts and the officers of the Section. The Executive Council, which met four times during the year, was assisted in its activities by the various committees of the Junior Bar and by a representative of the Junior Bar in each county. The committee members were selected from responses to a circularization of all lawyers of Junior Bar age wherein the Executive Council sought to know on which committees the young lawyers in the state were interested in serving. While all committees were active the following committees produced particularly outstanding results:

The Committee on Law School Panels presented an afternoon and evening program to the law students of the State University of Iowa and Drake University on April 4, 1956, and April 19, 1956, respectively. Four young lawyers gave their views

as to the practical aspects of various phases of the practice of law and the evening program consisted of a banquet, a speech and a panel discussion, wherein four young lawyers discussed the opportunities available to law school graduates in the large cities and the small town practice of law, governmental and insurance work where legal training is desirable. In addition to students, officers of the state bar association, faculty members and young lawyers recently admitted to the practice of law were present as guests. The response of both the students and the faculty was so gratifying that amendment to the by-laws was made at the annual meeting to make the committee a permanent one.

Under the direction of Patrick D. Kelly, of Des Moines, the Law Students Committee has succeeded in getting the Board of Governors of the Iowa State Bar Association to amend the by-laws to provide for free membership to all junior and senior law students in the association. The committee has also completed the first draft of a pamphlet containing helpful information to young lawyers of the Iowa Bar, which will be published by the West Publishing Company and distributed to all new admittees to the Iowa Bar.

The largest single project this past year has been participation in the American Bar Association membership drive. Under the direction of the President as State Membership Chairman, S. David Peshkin and Don Thompson, Chairmen for Des Moines and Sioux City, respectively, Iowa surpassed its quota of

218 new J.B.C. members. Much of the success of the drive must be contributed to the Executive Council members who served as membership chairmen in each Judicial District and the county representatives who were responsible for new J.B.C. members in each county. An excellent example of co-operation by Executive Council members is that of Thomas M. Collins, of Cedar Rapids, who signed up thirty-two new J.B.C. members there by making Cedar Rapids young practicing attorneys 100 per cent J.B.C. members.

The Speakers Bureau Sub-committee of the Public Information Committee distributed speaker kits to twenty-five county representatives throughout the state. The Special TV Sub-committee made preliminary arrangements with the public information service of the State University of Iowa towards the production of a special TV series on legal subjects of general interest. The Press Sub-Committee again obtained statewide publicity of Junior Bar Activities.

The Annual Meeting of the Junior Bar was held May 24 in Des Moines with Robert G. Storey, Jr., of Dallas, Texas, Chairman of the J.B.C., as principal speaker at the banquet. Harry G. Slife, of Waterloo, was elected President of the Iowa Junior Bar for the coming year.

During the past year the excellent relationship between the senior and junior members of the Iowa State Bar Association has continued with the younger members of the Bar assuming a more prominent role in the activities of the Association.

Books for Lawyers

(Continued from page 855)

Largely, the book has this value because its content is largely non-case material. There are full texts of some of the landmark opinions, of course, and a host of valuable references to others, but in principal part the book consists of excerpts

from books, articles, congressional committee reports, bar association monographs, newspaper articles, correspondence among government officers, and the like. They are well chosen, they are largely recent, and they form an unusually interesting collection well worth the reading. Provocative questions useful as peda-

gogical tools illustrate how many issues in this field are shrouded in doubt.

In sum, the book is at least as useful for the practicing lawyer as it will be for the law teacher and law student.

CHARLES A. HORSKY

Washington, D. C.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman; John S. Nolan, Vice Chairman.

Distribution Through the Use of a Controlled Corporation James A. Moore, Philadelphia

■ In *Emma Cramer*, 20 T. C. 679 (1953), several individuals owned the stock of Radio Condenser Corporation and, in substantially the same proportion, the stock of smaller, affiliated corporations. There had been valid business reasons for the organization and existence of the smaller companies, but sometime during the 1940's these reasons ceased to exist. Radio Condenser, which had a large surplus, could readily utilize the equipment, inventory and good will of the others. Accordingly, the stockholders sold their stock in the smaller corporations to Radio Condenser for its then fair market value.

The Commissioner argued that the price paid for the stock was a dividend (Section 115 (a) (1) 1939 Code), a redemption equivalent to a dividend (Section 115 (g) (1) 1939 Code), or boot in a reorganization taxable as a dividend (Section 112 (c) (2) 1939 Code). The taxpayers contended that this was just like the sale of any other asset to a controlled corporation. If, for example, the stockholders had owned real estate which Radio Condenser wanted, they could have sold it to the corporation and paid a capital gains tax. In the present case, they considered that they were similarly liable only for a capital gains tax on the gain equal to the excess of the sales price of the stock paid by Radio Condenser Corporation over their basis in such stock. The Tax Court agreed with the taxpayers, pointing out that Congress, in enacting Section 115 (g) (2), had taken care of sales between parent and subsidiary corporations, but had not provided similar treatment in this situation.

In 1950, Congress rejected an attempt to circumscribe such avoidance of dividend treatment through indirect redemptions of stock where the issuing corporation and the acquiring corporation are controlled by the same persons—the so-called "brother and sister" corporations. S. Rep. No. 2375, 81st Cong., 2d Sess. 43 (1950). But in Section 304 of the Internal Revenue Code of 1954, Congress sought to plug this loophole. The mechanism used was to treat the purchase of stock in a brother corporation as the equivalent of redemption of the stock of the acquiring corporation (Sec. 304 (a) (1)) so that, if the stockholders receive, directly or indirectly, amounts proportionate to their holdings in the issuing corporation, it will be a dividend. Section 304 (b) (2) (A) further provides that the dividend will be measured by the earnings and profits of the purchasing (acquiring) corporation. For purposes of determining whether both corporations are controlled by the same persons, the rules relating to attribution of stock ownership (Section 318 (a)) are applicable.¹

The Treasury Regulations (Section 1.304-2) give the following example of the operation of this section:

Corporation X and Corporation Y each have outstanding 100 shares of common stock. A, an individual, owns one-half the stock of each corporation, B owns one-half the stock of Corporation X, and C owns one-half the stock of Corporation Y. A, B, and C are unrelated. A sells 30 shares of the stock of Corporation X to Corporation Y for \$50,000, such stock having an adjusted basis of \$10,000 to him. After the sale, A is considered as owning 35 shares of the stock of Corporation X (20 shares directly and 15 con-

structively because one-half of the 30 shares owned by Corporation Y are attributed to him). Since before the sale, he owned 50 per cent of the stock of Corporation X and after the sale he owned directly and constructively only 35 per cent of such stock, the redemption is substantially disproportionate as to him pursuant to the provisions of section 302 (b) (2). He, therefore, realizes a gain of \$40,000 (\$50,000 minus \$10,000). If the stock surrendered is a capital asset, such gains is long-term or short-term capital gain depending on the period of time that such stock was held. The basis to A for the stock of Corporation Y is not changed as a result of the entire transaction. The basis to Corporation Y for the stock of Corporation X is \$10,000, the basis of the transferor.

However, while Section 304 has gone far to close the loopholes under prior law, the new concepts created for the first time under other provisions of the 1954 Code may create new avenues for tax minimization. Stockholders wishing to accomplish the same result might attempt to liquidate the small corporation, retain the cash, collect the receivables and sell the tangible property to the large corporation for its fair market value. In the alternative, the small corporation may, under Section 337, sell the assets and then liquidate. The Commissioner might attack either of these transactions with an argument analogous to that which prevailed in *Lewis v. Commissioner*, 176 F. 2d 646 (1st Cir. 1949), i.e., that this was a tax-free reorganization, so that the cash distributed to the stockholders was boot. See also *Tiddon v. Commissioner*, 230 F. 2d 304 (6th Cir., 1956). The applicability of the *Lewis* and *Tiddon* line of cases under the 1954 Code is questionable inasmuch as there must be a transfer of substantially all the assets of the transferor corporation for Section 354, and hence Section 356 (a) (2), to apply. Furthermore, the general fact remains that the transaction does not come within the literal wording of

1. It has been suggested that these attribution rules have created an almost complete overlap between this "brother and sister" case and the parent-subsidiary case. Cohen et al., "The Internal Revenue Code of 1954: Corporate Distributions, Organizations, and Reorganizations", 68 Harv. L. Rev. 393 (1955).

the reorganization sections. As the Tax Court states in the *Cramer* case, stockholders may still sell property to corporations in which they are interested and obtain capital gain treatment.

Other taxpayers may seek to turn Section 304 to their advantage. Suppose A and B form Corporation X with a capitalization of \$100,000. X makes \$50,000 the first year, and A and B desire to remove their sum at capital gain rates. Hence, they form Y Corporation with a capitalization of \$100,000. Y borrows \$50,000 from a bank, buys the stock of X for \$150,000, liquidates X, and pays the bank the \$50,000. Y has the original \$100,000, the bank has its money back, with interest, and A and B have the \$50,000 at capital gain rates unless

the transaction can be attacked in some way other than under Section 304. Section 304 does not apply because it first calls the sale a dividend, but then provides that the dividend is measured by the earnings and profits of Y, the acquiring corporation, which by hypothesis has no earnings and profits.

Under the old Code, such a device would have been considered crude. No statutory provision prohibited it, but under *Gregory v. Helvering*, 293 U. S. 465 (1935), it could probably have been determined that Y was a sham, and the \$50,000 treated as a dividend. It is probable that this would still be the result, but A and B contend that Congress specifically considered and covered this exact situation in Sec-

tion 304, but the section does not apply. If they could prove a business purpose for Y, the argument might be difficult to answer. Absent such a purpose, the Government could prevail in the same way it did on a liquidation and reincorporation under the old Code. See *Lewis v. Commissioner*, *supra*; *Tiddon v. Commissioner*, *supra*. There, as here, the statute specifically authorized capital gains treatment, but the sham was so apparent that it could simply be ignored.

In any event, it appears that Section 304 fails to achieve its purpose and conceivably, by failing to provide that the combined earnings and profits should measure the dividend, may have opened the way to some troublesome litigation.

such great cost to protect the individual are too often regarded as higgling technicalities and unnecessary obstacles to the realization of the objectives of the all-powerful state.

Despotism does not declare itself as such. Turning points are obscured, and there is no clear line of departure. The greatest tyranny has the smallest beginnings, in petty restraints and minor annoyances tolerated with indifference and complacency. The pattern is a series of small and all but imperceptible steps, of trivial benefits offered for broad and persisting powers, of minor oppressions that affect only small groups at a time, of the pursuit of worthy ends through doubtful means. It plays upon ignorance of the fact that liberty is a whole and upon the fatal error of thinking that we can barter some of our interdependent rights for a meager measure of creature comforts without jeopardizing our remaining freedom.

The Great Truths . . . Renewed in Time of Conflict

The great truths of humanity do not spring newborn to each generation. They emerge from long experience. They are the gathered wisdom of the ages. They are renewed in times of conflict and of danger. In this sense, the current challenge to our political

The President's Annual Address (Continued from page 828)

could never rise above the perfect order of the ant hill or the beehive. The ancient civilizations of China, Egypt, Athens, Rome and Spain—the fall of all these great societies teaches us that in stagnation there is only decline. As John Stuart Mill has written for us, "[A] State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no really great thing can be accomplished."

It is one of the paradoxes of labels that the theorist who embraces the cause of the stagnant and unchanging social order is allowed to call himself a progressive, while the believer in eternal progress and unlimited human growth is tagged in common usage as a conservative. The call for security, whether from the vicissitudes of the market or of the mind, is the cry of men of little faith. The man with the will to seek the truth and the courage to rely upon his own merit seeks instead the challenge of freedom. Another line from the prophetic pen of Thomas Jefferson is called to mind: "Timid men prefer the calm of despotism to the boisterous sea of liberty."

In the pervasive trend toward au-

thoritarianism, the revolutions of our time too often have been revolutions not to diminish the power of a government or to free the individual, but rather to establish a more absolute authority in the state. Throughout the world, nations of civilized and educated peoples, often with cultures more ancient than our own, have succumbed to the pipes of demagoguery and have been led, in quest of security, to totalitarianism and ruin. Among the European countries that enriched our own land—Germany, Italy, Russia and others—the routes were variant, but the destination was the same.

There are forces at work in our midst that would lead in the same direction. Many look with favor upon an ever-increasing and more pervasive control of our daily lives by government. More and more we look to it for the solution of every problem, for the satisfaction of every want or need. Greater and greater power is being concentrated in the central government, and, within that government, in the hands of a single branch. In mounting impatience with the fundamental guarantees that together comprise the rule of law, we resort with increasing frequency to administrative regulation through bureaucratic discretion. The bulwarks erected at

institutions may prove to be a kind of blessing in disguise. The great catalogue of human liberties contained in the first ten amendments to the Constitution endeavored to transmute the dignity of man into a living reality. In the turmoil of our times several of these inalienable rights have been brought to the forefront of our national conscience. Freedom of speech and of the press, the right to assemble peaceably and the privilege against self-incrimination have all found their staunch and vocal advocates. We have heard much of the first eight amendments, but in the clamor of controversy over these our people seem to have overlooked the Ninth and Tenth Amendments, declaring the limitations on the powers of the Federal Government and the rights which have been reserved to the states and to the individual.

The American creed is premised upon a simple belief: that each human being is a creature of God and endowed by Him with the dignity of individuality. Each must be free to shape his own integrity and to seek his own destiny. Respecting this right of the individual man to realize his own potential, we have pledged ourselves in the most solemn compacts of government to allow to our fellows the greatest freedom of choice possible in the exigencies of living together. Where choice must be limited to preserve the freedom of others, we have sought to assure that each shall have the greatest possible voice in making the collective decisions that will control his life, by keeping the powers of government as close as circumstances will permit to those subjected to the power. We have chosen to erect the structures of government in the belief that no national government should do what the states can do, that no state should do what the local government can do, and that no government should do what a man can do for himself. The movement for greater authority for the cities, the concern for states' rights, and the demand for some limitation upon the federal treaty power, all are variations on this recur-

ring theme—that government should not be removed from the hands of the governed, that choices which must be made collectively and not individually should be made by the smallest feasible group according to its own needs.

It is almost trite to observe once more that these principles were enshrined in the Constitution by the wise men who gathered to lay the foundations for the government under which freedom has flourished and our people have prospered. The central government was to be entrusted with limited and specifically delegated powers. Only those matters that required uniform treatment, only those problems that demanded a national solution, were delivered up to the centralized power. It is a familiar story, too, that these limitations of federal power are tending to lose all practical meaning. Blind to the purpose or scornful of the principle, our people have tolerated a reckless use of the war powers, the power over interstate commerce, the power to tax and the power to spend, for the unlimited aggrandizement of centralized authority. The cost of this trend is not only the sacrifice of efficiency in removing local decisions from the control of those best fitted to make them. It is not solely a matter of who can do the better job. An important and enduring value of local responsibility is the sense of participation in government it gives to each citizen. As matters of local concern are removed from local control to a distant and comprehensive central authority, the idea is fostered that government is somehow separate from the governed, that it is a thing apart, strange and supreme. As the easy familiarity with government processes fades, the notion grows that the individual is the creature of the state and no longer its creator.

But there is still another cost we pay. In the expansion of federal power at the expense of the states, our people have been too ready to wink at the use of a tax for purposes having no relation to the raising of revenues, at the use of federal funds to

purchase compliance with regulations that could not constitutionally be enacted as regulatory laws. In an easy tolerance for half-legality and a cynical indifference to principles violated, we have jeopardized the authority of the whole constitutional structure, and have turned our backs on the underlying premise of a government of laws and not of men. We have ignored the admonition of St. Paul not to "do evil that good may come".

Within the federal establishment, the forces of concentration have exerted a similar centripetal influence. That Government was formed in the knowledge that to vest unlimited power in any man, no matter how wise or pure of heart, is to invite the evils of autocracy. To avoid this end, the framers sought to avert its beginnings by dispersing the powers of government among its three functional divisions, each branch to serve as a check upon the authority of the others and a balance against their excesses. This fundamental design for forestalling the corruption of absolute power too often has yielded in the press of current circumstance. Despite the separation of powers, more than once in recent decades the legislature has been brought to heel by the executive. Through the power of patronage, the plums of public works, and the largess of a bountiful treasury, the executive has determined the national policy, and the legislative branch has relinquished its constitutional function of formulating the laws which the executive would administer, to serve at best as a censor of the executive's programs, and at worst as a rubber stamp.

But by far the gravest threat from the breakdown of the separation of powers would be the subservience of the judiciary. Upon those of our colleagues who are honored by judicial office we have conferred the ultimate power over our lives and fortunes. Upon their independence rests the fate of our freedoms. To the extent that the judge is able to resist the political forces that surround him, to the extent that his sense of professional obligation prevails, to

that extent, and to that extent only, can we fairly claim to be ruled by law and not by men.

In America we have sought to preserve to each man the freedom to grow, to employ his God-given talents as he, in the teachings of his conscience, believes best. We rest our government upon the consent of the governed; we recognize a numerical majority as the organ and expression of that consent; but we resolutely refuse to accept the voice of the people as the omnipotent voice of God. Against the greed or malice or ignorance or unwisdom of the majority we raise a barrier of constitutional right that it dare not cross and behind which men's liberties are to remain as secure from the tyranny of the crowd as from the tyranny of a king. We have proclaimed inalienable the right to think for ourselves and to speak our thoughts, to follow the faith of our choosing and to enjoy the fundamental attributes of human dignity and integrity—the rights of life, liberty and property. We have recognized that freedom of thought and religion will lose their meaning and wither away unless reason and morality are forces in their own right, unless they can be translated into action and achievement. We can see the cruel irony of leaving a man free to seek the truth but not to employ it in the work of his life. It is not enough to have the right to philosophize; the individual must also be left free to allocate his own energies, to build his own beauty and to weigh his wants in the scale of his own values.

We have protected the freedom to work, to earn and to own because we have learned that there are no separate and isolated freedoms, but only a general freedom. We have heeded the advice of Alexander Hamilton that "Power over a man's subsistence is power over his will." In accordance with these truths, we have set men free to work out their own destiny with their own minds and their own hands and in their own way, subject only to those limitations essential to preserve the freedom of others.

A simple truth that seemingly is not understood in a totalitarian regime is the fact that men are different. Each is something apart from all else, divine in his own right. We have faith in freedom because we believe in this individuality of men. If all were undifferentiated and equal, with the same wants and needs, the same talents and powers, freedom would serve no purpose and all human happiness could be encompassed within a single uniform plan. Only if each man is endowed with unique motivations, tastes, beliefs and drives must he be free to find his own fulfillment.

In a day of mass production and mass communication, of standardized products, standardized choices and, too often, standardized thought, we are in danger of becoming habituated to the concept of men in the mass. In a day of big government, big business and big labor, we tend to conceal the existence of living, breathing, hoping human beings behind impersonal labels, to speak not of people but of classes, groups and interests. We must guard against the error of accepting these verbal symbols as reality. In too much of current thinking the individual is merged into the mass, with a resulting exaltation of mediocrity and a tyranny of conformity. It is said that in order to make men manageable, individual differences have to be ignored, and since the lowest cannot be raised to the level of the highest, all must be reduced to an inferior common level. The one insuperable obstacle to the fully planned economy, to the permanence of any totalitarian state, and at the same time the greatest glory of a free society, is the inescapable fact that there is no average, no common, no ordinary man.

For all our material abundance and for all the logic of our governmental structure, the real strength of America is the spiritual and moral force of its ideals. Thomas Jefferson, in the troubled year 1782, put the fundamental question: "Can the liberties of a nation be thought secure when we have removed their only

firm basis, a conviction in the minds of the people that these liberties are the gift of God?" The power of each man to seek his own salvation and find his own destiny is the essence of the teachings of the world's great religions, and the wellsprings of our political beliefs lie deep in the heart of our spiritual faith. For three hundred years the American people have cherished the concept that the rights of man to freedom are personal to him from the Creator, not from the state. It was written in our Declaration of Independence. We stand in awe and humility before the wonder of the human soul. As each man is responsible to his God, so no man is fit to enslave another. The reawakening of people everywhere to the primacy of things of the spirit reminds us once more of the fallibility of man and the dangers of assuming to judge our fellows. We are reminded, too, that no mortal is so all-seeing and all-wise that he can create for the rest of us an earthly paradise, that only the omniscient can be all-powerful, and that only God is omniscient.

The ancient challenge—the vindication of freedom for mankind—is before us still. The world is gripped in bewilderment and fear. Half the earth is engulfed by a new and fanatic ideology, predicated upon absolute authority and armed with new weapons of political, psychological and physical warfare. In the face of such a challenge, armored defense is not enough. The call of the day is for a confident reaffirmation of our faith. History reveals no panaceas and records few instances of sudden ruin. An unwise law or a lost battle does not of itself bring the downfall of a civilization; forces generated from within must first nourish the seeds of decay. Man does not live by bread alone, nor will he perish by bombs alone. If we would see a tomorrow of promise, a universe not measured by our fears, we must preserve the spark of celestial fire that kindles the spirit of liberty under law. The fate of freedom as our fathers built it, as we have known it, and as we envision it for posterity, rests in our hands.

BAR ACTIVITIES

Charles Ralph Johnston • Editor-in-Charge

Clarence
KOLWYCK



Ed. Forstner Studios

■ The Diamond Jubilee Annual Meeting of the Bar Association of Tennessee was held in Nashville on June 14-16. This meeting was the best attended in the history of the Association, with 776 members registered of a total membership of almost 2400.

The new officers elected are Clarence Kolwyck, of Chattanooga, President; Charles G. Morgan, of Memphis, President-Elect; David Wade, of Pulaski, and Allen A. Kelly, of South Pittsburgh, Vice Presidents; and J. Victor Barr, of Nashville, Secretary-Treasurer. John C. Sandidge, of Nashville, was re-elected Executive Secretary. New Delegates to the House of Delegates of the American Bar Association are Weldon B. White, of Nashville, and John H. Doughty, of Knoxville.

President Weldon B. White presided over the highly interesting program.

In addition to unusually well attended workshop sessions and public service projects, a number of other important events marked the celebration of the Diamond Jubilee meeting of the Association.

The first annual meeting of the Bar Association of Tennessee was held at Bon Aqua Springs, about thirty miles west of Nashville, a favorite spa for those who desired to escape the Nashville summer heat just as in the case of the organization meeting of the American Bar Association, which took place at lawyer upon his admission to the Saratoga Springs, New York.

This first annual meeting of the Bar Association of Tennessee received little attention from the public or press, who were concerned with the hanging of Charles J. Guiteau, the assassin of President James A. Garfield. A total of seventy-three members attended and the work of the Association was carried on through five committees.

But the history of the Association shows the active interest of the Tennessee lawyers and judiciary in the advancement of the administration of justice. At this Diamond Jubilee meeting there were twenty committees reporting and eleven separate section meetings, showing that the untiring efforts of the Bar of Tennessee throughout the years have resulted in progress which has benefited both the Bar and the public.

The Association passed a resolution endorsing the Smith Act, H. R. 3, which would limit the power of the Supreme Court to invalidate state legislation which might conflict with federal legislation.

The Association also passed a resolution that beginning with 1957, a plaque be awarded each year to the Tennessee newspaper which had done the most to promote the administration of justice; that the newspaper reporter who had done the most to promote the administration of justice through an article or series of articles be awarded \$250.00, and that a suitable award be made to the law student who wrote the best essay on legal ethics.

We are pleased to note that the Canons of Professional Ethics recommended by the American Bar Association have been adopted by the Supreme Court of Tennessee, and that they have been incorporated into a dignified and handsome pamphlet which is presented to every young Bar. As a reminder of his solemn

oath of office, the booklet bears on its cover a picture of the beautiful, impressive paneled courtroom of the Supreme Court of Tennessee. Further evidencing the deep interest of the Bar and the Courts in the young lawyer are messages from the President of the Bar Association of Tennessee, the Chief Justice of the Supreme Court of Tennessee, the Attorney General of Tennessee, the Presiding Judge of the Court of Appeals of Tennessee and the President of the Tennessee Board of Law Examiners.

Among the prominent guests who attended in honor of this Diamond Jubilee meeting were E. Smythe Gambrell, President of the American Bar Association; John C. Satterfield, of Jackson, Mississippi, President of the Mississippi Bar; Maurice R. Bullock, President of the State Bar of Texas; Howell Hollis, President of the Georgia State Bar; Richard L. Garnett, Vice President of the Kentucky State Bar, and William McP. Christie of the British Bar, Nassau, Bahama Islands.

Thomas O. H. Smith, who retired after serving twenty years as Secretary-Treasurer, was honored with appropriate ceremonies.

A very interesting feature of the meeting was the address by Andrew J. Haley, of Washington, D. C., who has been prominent in the American Rocket Society and like organizations. He explored the realm of outer-space travel and the possibility of resulting changes in the law, in what is reported to be the first such address before any bar association in the United States.

The annual banquet was held on the lawn at Hillwood Country Club under a tremendous canopy. Nine hundred and thirty-six people were served. James G. Stewart, Justice of the Supreme Court of Ohio, made a most delightful and entertaining address.

■ The Supreme Court of California, upon recommendation of the Board of Governors, has amended Rule 9 of the Rules of Professional Conduct of the State Bar of California, forbid-

ding the commingling of the funds of client and lawyer.

The amended rule goes into effect on October 1, 1956, and reads:

Rule 9. A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company, authorized to do business in the State of California, in a bank account separate from his own account and clearly designated as "Clients' Funds Account" or "Trust Funds Account", or words of similar import. Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box at a bank or trust company authorized to do business in the State of California, which safe deposit box shall be clearly designated as "Clients' Account" or "Trust Account" or words of similar import, and be separate from the attorney's own safe deposit box.

This Rule seems to us to be a desirable safeguard for a client's property which well could be adopted by every bar association.

Robert D. JOHNS



■ The 77th Annual Meeting of the Wisconsin Bar Association was held in Madison, in the heart of "America's Dairyland", June 20-22. The new officers are: Robert D. Johns, who at 43 is the youngest President in the history of the Association, La Crosse; Rudolph E. Anderson, President-Elect, Superior; Robert E. Cook, Treasurer, Milwaukee, and Gilson G. Glasier, Secretary, Madison. Philip S. Habermann, of Madison, was reappointed Executive Secretary.

Retiring President Alfred E. La-

France, of Racine, presided over what was one of the most important annual meetings in the history of the Wisconsin Bar Association. The climax of the meeting was the decision of the Supreme Court of Wisconsin requiring the integration of the Bar of Wisconsin. This decision was the result of twenty years of effort by Association leaders and was entered upon a petition requesting integration filed by the Association earlier this year. Two earlier petitions had failed. Thus Wisconsin becomes the twenty-fifth state to have an integrated Bar. Integration will become an accomplished fact with the adoption by the Court of rules implementing its decision. Interestingly, Wisconsin is one of the few states to grant a license to practice law solely upon the diploma of an accredited law school within the state.

Almost as important was the approval of the program for erecting a Wisconsin Bar Center building in Madison to house the offices of the Association. The House of Governors of the Association by resolution paved the way for a solicitation of funds to defray part or all of the cost of the building.

A third significant action of the House was its approval and endorsement of the pending constitutional amendment to reorganize the judicial system of Wisconsin on a three-court level, with complete equality of judges and uniformity of practice and procedure throughout the state. All judicial authority would be vested in the supreme court, circuit courts and justices of the peace. Eliminated would be small claims, superior, civil, district, county and municipal courts. The joint resolution calling for the constitutional amendment will be placed before the legislature which convenes in 1957.

The two-day meeting was devoted to seven section meetings with bread-and-butter programs in addition to the business meeting of the House of Governors. These programs of the sections of the Associa-

tion play an important part in the annual and mid-winter meetings. By action of the House, a new section on Military Law was created at this meeting, upon the petition of more than fifty lawyers.

The usual social affairs and luncheons were well attended and this momentous meeting was closed by the annual banquet at which E. Smythe Gambrell, President of the American Bar Association, was guest speaker. His subject was "The Bar and the Public". In pointing out the real need for and the duty of the lawyer to provide leadership for a return to the principles of and to preserve our American republican form of government and way of life, he said:

Today there are vast uncharted frontiers—physical, spiritual and intellectual—standing as our constant challenge. We may well lose our will and our ability to cope with these challenges if we develop and accept the habit of being satisfied with the meager crumbs of material security which some form of benevolent government would dole out to us. To the extent that we permit ourselves to be so dependent upon government that we can no longer think or achieve on our own, dependent upon government for those things which traditionally we have provided for ourselves, we defeat the very meaning of democracy and permit government to rule rather than to serve the individual. By every step we take toward making the government caretaker of our lives we move toward making it our master.

• • •

Never before have the complexity, the diversity, and the interdependences of life so defied simplification and solution. The call in such a day is for men of judgment, able to rise above selfish concerns and allegiances, men who know the virtues of restraint, orderliness, and moderation, and who will heed the lessons of history. The need is for men who will blend self-discipline with God-fearing humility and a warm respect for the rights of their fellow men. The stature of statesmanship is not a commodity to be purchased. It cannot be gained by artifice or contrivance to attract public attention. The needed leadership logically should come from lawyers, all lawyers, whether they be in public office or in private practice.

Who is as well qualified by learning and experience? If, in these difficult times, lawyers are not the ones to lead the people out of the morass of their confusion, I ask, who is? We are members of a protected profession. Our society has been good to us. When society needs and calls us, we must be ready and willing to come to the fore and answer the call.

It was the good fortune of your editor to be able to attend this annual meeting. We were deeply impressed with the high caliber of Wisconsin lawyers and the energy and spirit of accomplishment of the Wisconsin Bar Association.

■ The Maryland State Bar Association held its 61st Annual Meeting in Atlantic City, New Jersey, on June 21-23.

The meeting was presided over by President Reuben Oppenheimer, of Baltimore, Judge of the Supreme Bench of Baltimore City. He was appointed a Delegate to represent his Association in the House of Delegates of the American Bar Association, as was the new President.

The newly elected President is Edward D. E. Rollins, of Elkton, a former attorney general of Maryland. New Vice Presidents are William D. Gold, of Cambridge; Wesley E. Thawley, of Denton; Elmer R. Haile, of Towson; William R. Offutt, of Oakland; Benjamin Michaelson, of Annapolis; John R. Reeves, of Bethesda; John B. Fray, of Prince Frederick; Rignal W. Baldwin, Jr., and Jerome Robinson, both of Baltimore. S. Vannort Chapman and Robertson Griswold, both of Baltimore, were re-elected Secretary and Treasurer, respectively.

The reports of the many committees and their programs clearly evidenced that the Maryland Bar Association in fact is a working association with many members making substantial and important contributions in numerous fields, including both matters of importance and aid to its members and real accomplishments in the field of public service.

Among the highlights of the meeting was the address given before a general meeting of the Association by David F. Maxwell, of Philadelphia, the new President of the American Bar Association. Mr. Maxwell reviewed the activities of the Maryland State Bar Association and the important part which members of the Association have played in furthering the work and aims of the American Bar Association.

President Oppenheimer ably expounded the subject of "Maryland's Legal Conservatism" and showed that often a conservative program of inaction by the public authorities has served the state better than one of action. Among a number of excellent examples he gave that of George Alexander Turnipseed, as follows:

Now let me hail a hero of our history who never lived. In March of 1930, times were desperate. Then, as now, some few gave their allegiance to a foreign government and sought to exploit the depression for their own purposes. Throughout the nation it was planned to hold demonstrations of communists and the unemployed and it was hoped by the communists that disorder would result. There was disorder in that month throughout the land, and violence threatened Baltimore. The communists planned a parade to end in the Memorial Plaza before the City Hall, but they claimed no permit was necessary because the streets were free. They therefore would not apply for a permit and on March 6th assembled in some force, permitless, as they thought. Then was the hero born, for it was found that, unknown to the communists, application had been made to our Police Commissioner, Charles D. Gaither, by one George Alexander Turnipseed, who, it was said, had joined the communists a day or two before. The address given by this Turnipseed, it was later found, was a number which, like Turnipseed, did not exist. But the permit was issued and, to their chagrin, the communists found that their parade, while flanked in force by the police, was altogether lawful. City officials waited for them in the City Hall, the acting Mayor, the President of the Fire Board and Theodore R. McKeldin, Secretary to Mayor Broening. They waited in vain to receive the

delegation, for the delegation never came. In Baltimore, almost alone of all of the eastern cities, there was no disorder on that March 6th and Turnipseed, who never was, will never be forgotten.

Raymond E. Baldwin, of Hartford, Connecticut, Justice of the Supreme Court of Errors of Connecticut, gave a most interesting and illuminating address on "The Lawyer's Service to the Public". Judge Baldwin gave many examples of the able, effective and courageous representation of unpopular causes by lawyers. One concerned a 1952 resolution of the Association providing that on the request of any person charged with being a Communist or subversive in criminal or in disbarment or other proceedings, the Association should appoint counsel to represent such person and that the appointment and the reason therefor should be made public. He stated that this was the first action of this kind taken by any bar association in the country. He also mentioned the recent defense of a number of Communists who were charged with violation of the Smith Act. Six able and prominent members of the Bar gave up weeks of time from their own practice to defend these persons against such charges. The Association voted to assess its members and to seek contributions for counsel fees for these lawyers. The judge further made the point that those critics who claim to be Americans, but who attached the stigma of Communism to these counsel, failed to understand their own system of justice.

C. Ferdinand Sybert, Attorney General of Maryland, spoke on the topic, "Maryland Administrative Procedure—The Law and the Lawyer". He gave a thorough analysis and discussion of the chaotic condition of the various administrative regulations and procedures in the State of Maryland. He then urged the adoption of an administrative procedure act for Maryland to be based largely upon The Model State Administrative Procedure Act.

John B.
BURKE



■ The Minnesota State Bar Association held its Annual Meeting in Minneapolis on June 20-22.

New officers are John B. Burke, of St. Paul, President, and James G. Nye, of Duluth, Vice President. Re-elected were James D. Bain, of Minneapolis, Secretary, and Earl L. Anderson, of St. Paul, Treasurer.

President John M. Palmer, of Minneapolis, presided over the largest annual meeting in the history of the Association, with 790 members in attendance.

The meeting approved a number of legislative bills which will be sponsored by the Association in the next session of the legislature, among which two of the most important are the Administrative Law Bill and the Medical Examiner Bill.

The Junior Bar Section held its first annual meeting and panel institute, the subject of which was "Revision of the Judiciary Article of the State Constitution". Roger L. Dell, Chief Justice of the Supreme Court of Minnesota, served as moderator, and the panelists were Miles Lord, Attorney General of Minnesota, Senator Gordon Rosenmeier, Charles B. Howard, Chairman of the Constitutional Revision Committee, and Probate Judge Andrew J. Glenn. Members of the Junior Bar Section will discuss this important matter throughout the state as a public service before the November election.

A plaque in recognition of his many years of outstanding service to the legal profession in Minnesota and the nation was awarded to W. W. Gibson, of Minneapolis.

All who attended were highly commendatory of the fine hospitality of the host association, the Hennepin

County Bar Association. The meeting was extremely well arranged and both business and social events were indeed well handled. Entertainment was novel and outstanding.

Among the featured speakers was John Cowles, President of the *Minneapolis Star and Tribune*, who gave a timely address on the world situation before a joint meeting of the Real Property Law and Junior Bar Sections. A. Cecil Snyder, Chief Justice of Puerto Rico, delivered a most interesting speech before the annual banquet on "Judges Under the Sun".

The 1957 Annual Meeting of the Minnesota State Bar Association will be held in Duluth.

Newton
GRESHAM



■ The State Bar of Texas held its 74th Annual Meeting in Houston on July 4-7.

New officers are Newton Gresham, of Houston, President, and Virgil T. Seaberry, of Eastland, Vice President. Re-elected were William E. Pool, of Austin, Secretary-Treasurer, and John R. Grace, of Austin, General Counsel. Newly elected members of the Board of Directors are Buster Cole, of Bonham; Paul Carrington, of Dallas; W. S. Barron, of Bryan; F. P. Granberry, of Crockett; John B. Daniel, Jr., of Temple; Richard F. Stovall, of Floydada, and Ralph Logan, of San Angelo. New delegates to the House of Delegates of the American Bar Association are William Jarrel Smith, of Pampa; R. N. Gresham, of San Antonio, and R. L. Dillard, Jr., of Dallas.

President Maurice R. Bullock, of Fort Stockton, presided over this very busy and eventful meeting. Five sections and thirty-two committees reported.

E. Smythe Gambrell, President of the American Bar Association, addressed the general assembly on the subject of "The Call to Statesmanship".

One very worthwhile program was that of the Legal Institute, entitled "The Roll Top Desk in the Atomic Age". This program covered a day and ranged through a very fine address by Charles S. Rhyme, of Washington, D. C., Chairman of the American Bar Association House of Delegates; a Comparison of Fee Schedules; and Practical Use of Fee Schedules; the Economic Condition of the Legal Profession in Texas, and What Does the Texas Economic Survey Mean to the Practicing Lawyer?; a Law Office System; Efficient Adjustment of the Relationship Between Lawyers in Small and Medium Sized Firms and Achieving Satisfactory Lawyer-Client Relations. This Institute undoubtedly was one of the most helpful of all possible aids to more efficient and productive use of his time that could have been presented for the benefit of the Texas lawyer.

It is a source of deep regret that space limitations just will not permit the publication of the names of all the fine lawyers and judges who participated in the various events of this meeting and contributed to make it a success. It would be well to remember that in addition to being the largest state in the Union, the Lone Star State has 160 local bar associations, the State Bar of Texas has 12,300 members, of whom 2,295 registered and attended this annual meeting, and that the total number of section meetings, committee meetings, panels and other events constitute a staggering total.

President Bullock's annual address, presented before the general assembly of the meeting, was a report of the Association's activities during the year. He recounted the achievements of the 750 committee members, as well as the countless members of the 160 local bar associations and numerous individuals who rendered yeoman service in

Bar Activities

fields too numerous to recount here. Among the outstanding contributions of the State Bar of Texas to the public and its members were the distribution of six public service pamphlets prepared by the Public Information Committee; a dozen prints of the Committee's film, "With Benefit of Counsel", which has been in constant use throughout the state; a weekly newspaper column, "It's the Law in Texas", published weekly by more than 300 Texas newspapers; radio transcriptions and television scripts which have been made available to a number of local bar associations and countless news releases informing the public concerning bar activities. The Committee on Legal Education and Institutes participated in the presentation of thirty-three programs of one or more days' duration throughout the state and numerous shorter programs covering a large variety of subjects. The study of the economic condition of the Texas Bar has been begun and is well under way. The Committee on Constitutional Revision has proposed a number of amendments of the Judicial Article; and the Committee on Coordination of Activities with the American Bar Association has recommended consideration of an amendment of the Texas Insurance Code to permit Texas lawyers to participate in the group insurance program of the American Bar Association. A mere review of the unselfish labors and achievements of the State Bar of Texas constitutes a record of which the Association well may be proud.

United States Senator Sam J. Ervin, Jr., of North Carolina, gave an important address on the subject of "Alexander Hamilton's Phantom", before the general assembly. Chief Judge Bolitha J. Laws, of the United States District Court of the District of Columbia, spoke before the Judicial Luncheon on "The Bench and Bar Needs Better Public Relations".

The featured speaker after the annual dinner was Robert J. Farley, Dean of the University of Mississippi

School of Law, who spoke upon the provocative and intriguing subject of "Let the Rough Side Drag".

Thomas M.
RAYSOR



■ The Bar Association of the District of Columbia held its 85th Annual Meeting in Washington on June 12. President Charles S. Rhyne, of Washington, presided. About 500 members were in attendance.

The new officers are Thomas M. Raysor, President; Bernard I. Nordlinger and John P. Moore, Vice Presidents; Charles Effinger Smoot, Treasurer, and David C. Bastian, Secretary. All are of Washington. George L. Norris, of Washington, was reappointed Executive Secretary.

New members of the Board of Directors, all of Washington, are Albert F. Beasley, Charlotte P. Murphy, John C. Poole, Murray Preston, Joseph A. Rafferty, Sr., Smith W. Brookhart, Richard H. Mayfield and Charles S. Rhyne.

The new Delegate to the House of Delegates of the American Bar Association is W. Cameron Burton, of Washington.

The Bar Association of the District of Columbia is unique in that its annual meeting is primarily devoted to the installation of new officers. Virtually all business of the Association is conducted during its regular meetings and the monthly meetings of its Board of Directors.

President Rhyne's annual report shows a year bright with real progress and achievement in service both to the members of the Association and the public. A brief enumeration of the events of this very successful Association year shows the following:

A newly created Lawyer Referral Service now will enable any person having a legal problem but who is without a lawyer to find one competent to handle that particular case;

The newly formed Commission on Legal Aid will provide valuable recommendations for improving free legal services to the needy;

The new affiliate of the Association, The Research Foundation, is qualified to receive grants of funds for carrying out the thorough independent investigations which many national and local legal questions require;

A very significant amendment of the by-laws now eliminates the requirement that all members of the Association be "white" lawyers. Two Washington papers, the *Evening Star* and *The Washington Post and Times Herald* have written laudatory editorials based upon this action.

Many other interesting and helpful meetings, panel discussions and other programs too numerous to mention were presented from time to time during the year.

E. Smythe Gambrell, of Atlanta, President of the American Bar Association, spoke on "The Challenge of Statesmanship". At the annual dinner, the Chief Justice of the United States, five Associate Justices of the Supreme Court and Mr. Gambrell were honored guests.

The Junior Bar Section was extremely active and its meritorious accomplishments were many.

One of the most important actions of the Association was the appointment of George L. Norris, as full time Executive Secretary. He is a lawyer who has had wide experience in the newspaper and trade association fields. Under his guidance, the Association feels that its service to the public and the profession will be substantially increased.

The many who knew Mrs. Florence P. McDonald will greatly miss her from the headquarters office. Retired in March of this year because of ill health, it is good to report that she

now is on the way to complete recovery. The Association is greatly indebted to Mrs. McDonald for her twenty-four years of devoted and fruitful service.

Werner W.
SCHROEDER



■ The Chicago Bar Association held its 83d Annual Meeting in Chicago on June 21. President Augustine J. Bowe presided over an eventful gathering.

The new officers, all of Chicago, are Werner W. Schroeder, President; E. Douglas Schwantes, First Vice President, Jerome S. Weiss, Second Vice President; Len Young Smith, Secretary; R. Newton Rooks, Treasurer, and Hubert L. Will, Librarian. Richard H. Cain was reappointed Executive Secretary.

Newly elected members of the Board of Managers, all of Chicago, are George M. Burditt, James A. Dooley, Abner Goldenson, George N. Leighton, William J. Lynch, Lee C. Shaw and Benjamin H. Weisbrod. The new Delegate to the House of Delegates of the American Bar Association is Jerome S. Weiss.

President Bowe in his annual address reported on the numerous activities conducted during the Association year. A report of the Committee on the New Central Court-house Building was made by Cornelius J. Harrington, Chief Justice of the Criminal Court of Cook County, Joseph D. Lohman, Sheriff of Cook County, and Erwin W. Roemer, past president of The Chicago Bar Association. This joint report, together with the remarks of incoming President Schroeder, well stated the consensus of Association members as to the principal problem faced by the Bar and the judiciary of

Cook County, that is, that the current congestion of Cook County court calendars is a cancer in the administration of justice. Under the Illinois constitution, Cook County is entitled to thirty-three more judges, but there would be no place to house them. So one pressing part of the problem of delayed justice will require a new courthouse for its solution. Another phase of the problem of vital importance to every citizen is to secure a revision of the Judicial Article of the Illinois constitution, to provide long overdue administrative streamlining of the courts and a method of selection of judges which would take them out of partisan politics. The Association looks forward hopefully to ultimate success in solving this most serious problem very largely because of the fine caliber and earnest desire to remedy the situation of the members of the Bar and others of both political parties who now are working hand in hand for a desirable solution.

Also of real importance is the fact that the Illinois State Bar Association is co-operating with The Chicago Bar Association in every way possible to bring about these much needed reforms.

Retired Chief Judge J. Earl Major, of the United States Court of Appeals for the Seventh Circuit, delivered an address on the subject of "Federal Judges as Political Patronage". Judge Major reminded his hearers that bar associations and lawyers generally for years have made sustained efforts to obtain legislation designed to remove the selection of state court judges from partisan politics. But he said that an intensive investigation made by the late Evan A. Evans, Chief Judge of the Court of Appeals for the Seventh Circuit, showed that between 1884 and January, 1941, both major political parties had pursued the policy of appointing only judges of their respective political faith, then had freely indulged in criticism of the other party for following precisely the same course.

While granting that the system

had placed on the Bench able and conscientious judges, Judge Major stated that he had no doubt but that this partisan system of appointment creates an unfavorable impression in the minds of the public in the same manner as does the selection of state court judges on a partisan basis. He said:

The stature of a court is dependent in large measure upon the confidence which the public has in the judges' honesty, integrity and freedom from entanglements of all sorts, including political. A dismantlement of the courthouses would be no more inimical to the welfare of the Republic than a judiciary composed of judges lacking public confidence.

He then pointed out that under the present system of appointment frequently the senior Senator of the state and the President could not agree on an appointment, sometimes for a period of years; that in other instances an indisputable need for the creation of additional judgeships would exist for several years because of a similar deadlock between the two major parties.

Strongly disclaiming any intention to leave the impression that federal judges are motivated by their politics, Judge Major stated that public confidence in the federal judiciary would be greatly enhanced if judges were selected on a non-partisan basis. He quoted from a report of the Standing Committee on Federal Judiciary of the American Bar Association, dated May 1, 1954:

... judicial vacancies offer tempting opportunities for political patronage. The American Bar however is committed to the principle that judges and politics should not mix. . . . If that principle is accepted, it would do much to improve the standards of the judiciary. The best man available for the office of judge, regardless of his political strength or background or party service should be named and if this be done our courts would gain stature, quality, dignity and respect.

Judge Major then persuasively argued that the constitutional provision requiring judges of the Supreme Court to be nominated by and with the advice of the Senate does not apply to the courts of appeal or

other inferior courts which the Constitution merely provides "shall be established by Law". He cited the cases of a number of inferior courts, commissions and agencies the validity of whose creation has been upheld and on which Congress has provided that the current minority party should be represented.

Judge Major concluded that:

It follows that there resides in Congress, as a minimum, the power to place a limitation upon the right of the President to nominate by requiring that judicial appointments be made on a non-partisan basis.



J. Leonard SWEENEY

■ The Bar Association of the State of New Hampshire held its Annual Meeting in Jefferson on June 29-30. President Arthur H. Nighswander, of Laconia, presided over this busy meeting.

The new officers are J. Leonard Sweeney, of Nashua, President; Emile Lemelin, of Manchester, Vice President, and Willoughby A. Colby, of Concord, who was re-elected Secretary and Treasurer.

Mr. Colby also was named Delegate, and John W. Perkins, of Exeter, Alternate Delegate, to the House of Delegates of the American Bar Association.

Following a message of welcome by President Nighswander, E. Smythe Gambrell, President of the American Bar Association, delivered an address entitled "The Ancient Challenge Is Still With Us".

A down-to-earth panel discussion was presented on "How To Settle a Lawsuit—the Evaluation and Adjustment of Tort Claims". William A. Grimes, of Rochester, Associate Justice of the Superior Court, served as moderator. Frederick K. Upton, of

Concord, and Lewis J. Fisher, of Dover, were counsel for the plaintiff. Claud J. N. Weber, of Boston, Massachusetts, and Joseph A. Millimet, of Manchester, were counsel for the defendant. The consensus of the large number who attended this panel was that a very substantial contribution to their working knowledge had been made.

Another worthwhile panel discussion was "Investigation and Trial of a Tax Fraud Case", which covered various violations of the Internal Revenue Code and the steps taken in such a case from the initiation of the investigation through the pretrial and trial procedures. Participants in this practical panel discussion were Burton L. Williams, of Boston, Massachusetts, former prosecutor of many important tax evasion cases with the Internal Revenue Service; and Maurice P. Bois, of Manchester, United States District Attorney for New Hampshire, and Roger M. Charpentier, Special Agent in the Intelligence Division and Instructor at Special Agents Schools in the Internal Revenue Service.

The Association adopted and sent to Mrs. Louis E. Wyman a resolution expressing its appreciation of the many years of devotion to the work of the Association by Louis E. Wyman, of Manchester, and its regret at his inability to attend this annual meeting because of his serious illness.

The featured speaker at the annual banquet was Robert F. Kennedy, of Washington, D. C., Chief Counsel and Staff Director of the Senate Permanent Sub-committee on Investigations. His subject was "Inside Russia".

■ Judge James B. M. McNally, Chairman of the Board of Justices of the Supreme Court of the State of New York, First Judicial District, has favored us with a copy of *A Handbook for Trial Jurors*, which for the past two years has been distributed to every juror who served in that court.

This *Handbook* attempts briefly

to demonstrate the need for courts of justice in which disputes can be justly and peacefully settled; that justice for all is the personal concern of the juror who himself some day may become involved in a lawsuit; and that although service as a juror may be inconvenient or even cause financial loss, still it is a necessary duty of every citizen, as well as an honor and privilege to serve in the administration of justice.

This *Handbook* also briefly explains the frequent unavoidable periods of waiting by jurors, the steps whereby a jury is selected, the titles of the pleadings and the terms used to designate the various parties in a law suit, the events of and their order in a trial, and the respective duties of judge and jury.

Lastly, the *Handbook* cautions the juror to be patient and not to form conclusions until the jury retires to consider its verdict, and states some of the general rules governing his conduct and his decision which apply to every juror in every case.

We are aware that in some states the use of such a handbook has been banned by the courts on the grounds that jurors thereby might be misled and that the same constituted instructions to the jury which were not in writing and were given outside the presence of counsel. We believe such objections are hypercritical. It is our firm conviction, based upon thirty years of trial experience, that such a handbook containing cautionary and general rules, if properly and accurately worded, would be a distinct aid to arriving at substantial justice in the trial of jury causes in any state. A careful examination of this *Handbook* used in the New York Supreme Court shows it to be an excellent example of the type of handbook which is needed.

We should be happy if every judges association or bar association which has prepared and distributed a handbook for the guidance of jurors would send us three copies thereof which we would list under our section of this department entitled "In the Public Service". We feel that the

use of such a handbook should be universal, and that the resultant better understanding of the position and duties of jurors would serve both to eliminate much unjustified criti-

cism of the jury system and lawyers by laymen and to improve the quality of justice rendered in jury cases.

In the Public Service

■ We ask every bar association which has published any public service pamphlets, leaflets or other materials to make them available to any other association interested, at cost, with permission to adapt, reproduce and distribute them under the name of such other association.

We shall be happy to serve as liaison agent in this matter and we ask every bar association to inform us whether it will, or is unable to, participate in this undertaking. From the secretary of every participating association, we should appreciate receiving a letter giving the requested permission and enclosing three copies of each pamphlet, leaflet or other material; we then shall publish under the above caption the name and address of the association which prepared the material, its title and, if necessary, a brief resume of its contents.

To obtain courtesy copies of any public service materials mentioned in this section, the executive secretary or secretary of your association should write to the publishing association, enclosing a check for 25 cents for the first three copies ordered plus 5 cents for each additional copy to cover the costs of handling, packaging and mailing. If in special cases there is a greater charge for any item, the amount will be stated.

We believe that those participating in this joint endeavor are making a substantial contribution to good public relations of the Bar while rendering a public service of the highest order.

■ The following was prepared by the BAR ASSOCIATION OF THE STATE OF NEW HAMPSHIRE, 39 North Main Street, Concord, New Hampshire:

Have You Made a Will? contains brief and well thought out answers to the following questions: What Is a Will? May I Dispose of My Property in Any Way I Wish by Will? Must I Leave My Children at Least One Dollar Each? Does a Will Make for More Probate Expense? Why Make a Will? What Happens When There Is No Will? How Long Is a Will Good For? Is Joint Tenancy a Substitute for a Will? What Is the Effect of the Will on Life Insurance? What Part Do Taxes Play on My Will? Who Should Draft a Will? This is an excellent pamphlet based upon New Hampshire law, and would be valuable as a model as the entire contents very easily could be adapted for use in any state.

■ The following were prepared by THE CHICAGO BAR ASSOCIATION, 29 South LaSalle Street, Chicago 3,

Illinois.

When You Buy on "Time!" defines succinctly and in simple language a conditional sales contract, a promissory note, co-signer, confession of judgment, wage assignment, and garnishment, and tells how collection is enforced and the results of default in payment. Also gives some important facts pertaining to bank loans, small loan companies and credit unions, with a check list of caveats for the guidance of installment buyers. (Also published in Spanish).

So You're Going To Buy A Home! contains an excellent summary of important information pertaining to the legal problems of the buyer of a home. It defines and explains briefly the implications of an agreement to purchase a clear title, title guarantee insurance, a warranty deed, and whether title should be taken in joint tenancy; and enumerates the most important points the purchase contract should cover, and the vital details of closing the deal.

Meet Your Lawyer. An excellent brief exposition covering the following: Why Do Governments Exist? Why Does a Government Enact Laws? What and Who Is Your Lawyer? What Can a Lawyer Do for You? How Much Should You Tell Your Lawyer? How Do Lawyers Charge for Services? What Is Meant by Legal Ethics? What Is a Lawyer's Duty in Civil Cases? What Is His Duty in Criminal Cases? Can Anyone Practice Law? This pamphlet also contains a brief resume of The Chicago Bar Association's activities and objectives. The entire contents very easily could be adapted for use in any state.

What About Your Will? shows that a will is just as important to people in modest circumstances as it is to those with vast holdings. It gives the Illinois requirements for a valid will and briefly answers the following questions: What Is a Will? What Happens When There Is No Will? Does It Cost More To Have a Will? What Is Involved in Settling an Estate? Is Joint Tenancy a Substitute for a Will? Can a Will Be Changed? When Should a Will Be Changed? **What Every Driver Should Know** ... about automobile accidents. This pamphlet gives brief answers to the following questions: *What I Should Do at the Scene?* (Stop; Arrange assistance for the injured; Remain at the scene; Make a written record; Write down license numbers; Obtain names of witnesses; Avoid arguments; Do not sign anything). *What Should I Do After the Accident?* (See your doctor; File reports; Notify your insurance company; Do not make statements or sign releases, and Select your own attorney.)

Know Your Courts contains a well-written capsule synopsis of all of the federal courts in Cook County, Illinois, and of all the other Illinois trial and appellate courts. Although written primarily about Illinois courts, this pamphlet could be adapted for use in any state.

The Difference Between a Notary Public and a Lawyer in the State of Illinois. (Published in Spanish only).

(Continued from page 845)

choice were left to each judge, some would find it difficult to stand up against the pressures that the local media would exert upon them to let the photography and broadcasting bars down.

In the report of the special committee on co-operation between the press, radio, bar, etc., of which the late Newton D. Baker of Cleveland was chairman, the committee said:

The whole hierarchy [of the judicial system] has become inextricably entangled in politics, and the tradition of a learned dispassionate, and detached judiciary often fails badly when judges are chosen by popular election, and judicial tenure, as well as legitimate aspirations for judicial advancement, depend, not upon capacity or character, but rather upon subservency to a popular opinion which, in the nature of the case, can have no knowledge of the demands of judicial office but in fact responds to adroitness in the arts of political appeal.¹⁴

It is submitted we are entitled to conclude that there is something more than a mere possibility that photography and broadcasting will affect trial participants and consequently the trial.

A Revised Canon . . . The Effect on the Public

Whether it can be proved or not, many members of the Bench and Bar will assert that public opinion plays an important part in the determination of lawsuits. The severe limitations placed upon the power of a judge to punish for contempt have aggravated this situation.¹⁵

Distinguished representatives of the Bar, the American Newspaper Publishers Association, and the American Society of Newspaper Editors unanimously agreed in 1937 that:

Notable criminal cases, which last many days and are discussed from hour to hour by newspapers and broadcasts, no doubt often present the situation of a jury surrounded by an audience which has made up its mind and whose attitude toward witnesses, perhaps unconsciously evinced, creates an atmosphere of which even a blind jury could not remain unconscious. It is for this reason that trial

by popular emotion may find a way of enforcing its own verdict and it is for this reason that the courts of England, through long courses of years, have gradually evolved repressions of publicity until after the verdict, which are quite inapplicable in American courts at the present time.¹⁶

John M. Harrison, Associate Editor of *The Toledo Blade*, a newspaper noted for its adherence to high standards of journalistic ethics, has said:

They [newspapermen] know that the media of mass communication, which literally blanket whole areas today, can create—and have created—conditions in which a fair trial is virtually impossible.¹⁷

An intelligent observer whose writings about judges and courts have received national recognition, Catherine Drinker Bowen, has said:

In such trials [big dramatic cases], everything is warped by that huge imponderable which enters the court room: *public opinion*. It was that way in 1600, it is that way now. Academically, these cases are not typical of customary procedure. Nevertheless, the layman, the general public, does look on such trials as, let us say, a *test* of how well customary procedure holds up under stress.¹⁸

An eminent trial lawyer, Lloyd Paul Stryker, made this observation concerning pre-judgment coverage of trials by newspapers, but it is equally applicable to the other media:

The only place for a trial of a case is in the court room, and yet, how often do we see the newspapers trying the defendant on their own, independent of the court or jury. What is printed in the press is ultimately seen by the jury, no matter what judicial injunctions have been made.¹⁹

Pictures can and do mold public opinion. Those of us who followed

on TV and in the press the Army-McCarthy hearings had this confirmed more and more as each day passed. Those newspapers who favored Senator McCarthy somehow managed to catch him with a sweet, angelic expression, while those who opposed him arranged to snap their shutters when the Senator's facial expression and heavy beard seemed to suit him admirably for companionship with the late Al Capone.²⁰

Another Problem . . . Partial Showings of Trials

What would be the effect of the partial showing of a trial on television? Assume that a TV director with ten minutes of a trial to take has his choice between a photogenic blond witness for the prosecution and a dull uninteresting witness for the defense who rebuts the blond's testimony, or both. Who will get the preference? And what TV-watching spouses of what jurors will tell their juror-spouses how to vote when they return home that night, despite the injunction of the court not to discuss the case with anyone?

On that subject, Jack Gould, *New York Times* columnist, has this to say:

By then (a broadcast of the testimony of a prosecution witness only), the damage of a one-sided presentation has been done, and TV would be powerless to rectify the imbalance.²¹

Likewise, C. A. McKnight, Editor of *The Charlotte [North Carolina] Observer*, wrote this about partial coverage of the desegregation issue:

In part, this [misunderstanding of the Southerner's dilemma] is be-

them and to deal with them individually."

16. 62 A.B.A. REP. 851, 853.

17. *The Press v. The Courts*, *THE SATURDAY REVIEW*, October 15, 1955.

18. *By Slow Degrees*, *ATLANTIC MONTHLY*, February, 1955.

19. *THE ART OF ADVOCACY*, Simon and Schuster, (New York, 1954). Also to the effect that the printed word profoundly affects public opinion, see: *BOOKS THAT CHANGED THE WORLD* by Robert B. Downs, American Library Association, 1956.

20. In a contemporary article, *LIFE* magazine had this comment to make on the hearings:

"If the [McCarthy-Army] hearings have proved anything to date, it is that court room procedure, with its strict rules on conduct and introducing evidence, is a most marvelous human invention."

21. *NEW YORK SUNDAY TIMES*, March 13, 1956.

cause newspaper, magazine, and radio-TV coverage of the race story tends to single out the area of conflict, which is more spectacular, and to minimize or even ignore areas of quiet constructive accomplishment.²²

Most newspapers make an honest attempt to cover both sides of a trial impartially. It is only the super-sensational case which draws the sob-sisters and the slant-writers from a few. Full coverage is an impossible task for the broadcasters except in a most unusual case. Previous time commitments would necessitate only a partial broadcast.

Broadcasting part of a trial is like broadcasting part of a boxing-match. Both are events of conflict, the results of which depend upon point-by-point progress. No juror who has heard less than the whole evidence is competent to vote on a verdict, and no boxing judge who has seen less than the entire match is competent to vote on the decision. No TV viewer who has seen less than the entire event is able to express an intelligent opinion on the eventual outcome.

It is unfair, as has been done by some²³, to compare broadcast of the court trial to the broadcast of a coronation, a presidential inauguration, a church service or similar event. In these ceremonies there is no conflict—no search for truth amid a confusion of facts. The results are known in advance, and public opinion, no matter how strong, cannot alter those results.

An Essential Right . . . The Right of Privacy

Much has been said pro and con on the subject of the right of privacy of participants in a trial. I do not believe a detailed review of it essential to this discussion. However, to summarize the argument: The media claim that exposure in a public place renders one subject to be photographed and broadcast. The position of the supporters of Canon 35 is that consent of the subject must first be obtained or there is an invasion of the right to be let alone.

The lawyer members of the committee on co-operation between

press, radio, Bar, etc. had this to say in 1937:

Pictures of the accused, taken without his consent, and of witnesses who are obliged to be present, often under circumstances of great emotional distress, seem to a majority of us to impose an unnecessary hardship upon the doing of a duty which society commands. . . . The accused is still protected by the presumption of innocence and would seem entitled not to be photographed without his consent merely because he is temporarily rendered unable to protect his own rights. Women and children, whose presence at a trial is compelled, are often humiliated by the thought that they are accidentally associated with the sordid details of a criminal trial. To a majority of your committee it seems an unjustifiable addition to their distress that they should be photographed against their will, pictured in the press, and their personal appearance and clothes made the subject of gossiping comment. That there are witnesses who enjoy this kind of publicity is no justification for inflicting it upon those who shrink from it.²⁴

If the argument of the media is valid, then proceedings of the grand and petit juries can be invaded, and the conferences of the District Attorney with informers would be legitimate news. And what about the mother giving birth in a public hospital assisted by employees paid by the public? Where shall the line be drawn?²⁵

Forceful arguments in favor of applying the doctrine of the right of privacy to court trials are the broadcasting of hearings of the Kefauver Committee type. There, witnesses

and lawyers alike were suspected of being wrongdoers and worse merely by virtue of their appearances before the committee. In effect, viewers said: "If they're not guilty, the Senator would not have called them."

Service or Self-Interest? . . . The Motives of the Media

If the media have no constitutional grounds for complaint because they all have free access to the courts now, isn't it legitimate to inquire as to their motives in seeking an extension of this right?

The media have four functions: The dissemination of news (including educational news), the entertainment of the public, the editorial guidance of public opinion, and the conduct of a business in which it is hoped profits will be made. Which of the four functions is the primary concern of any member of the media group is unimportant except to note that the first three functions are usually undertaken for the attainment of the fourth.

In their arguments against Canon 35, the media have emphasized the first function. It is submitted, however, that what may be one man's news may also be another's entertainment, and that if the right is extended, cases like the James and Romelle Roosevelt divorce and the Minot Jelke case would be considered top-priority stuff. Where photography and broadcasting have been permitted, murder and other criminal cases appear to be deemed the most newsworthy.²⁶ If education as

American public of the right to be informed by all media."

25. In an editorial on Wednesday, September 1, 1954, the New York Times said:

"It is not always easy to draw a line between the public's right to news and the individual's right to justice. Various methods have been proposed to achieve this end; and whatever their merits, we do not think anything is to be gained by the kind of violent name-calling that sometimes takes the place of argument when such proposals are discussed."

26. The photographing and broadcasting of trials has been more extensive than many judges and lawyers believe. Recent examples are the George Sach murder trial at Portland, Oregon, in 1954, the Harry L. Washburn murder trial at Waco, Texas, in 1955, and the James and Romelle Roosevelt divorce case in California in 1954. The writer has made no effort to analyze the nature of the cases which have interested the media. It is submitted, however, that coverage of sensational cases only would be sought. Others would have no "news" value.

22. COLLIER'S, June 22, 1956.

23. The argument is that a courtroom is no more sacrosanct than a church. (Miller, note 5, *supra*)

24. 62 A.B.A. REP. 851, 863. This right of privacy was respected in the recent decision of the Colorado Supreme Court permitting the photographing and broadcasting of trials in the discretion of the trial judge. The order reads in part as follows:

" . . . Provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection. . . ."

The media are already dissatisfied with the order after having hailed it as a major victory in their campaign. In a letter of transmittal of a copy of the Colorado decision, Robert D. Swezey, Chairman of the Freedom of Information Committee of the National Association of Radio and Television Broadcasters, said:

"The Freedom of Information Committee believes that this limitation is both unnecessary and discriminatory. It weakens the authority of the trial judge and deprives the

Should Canon 35 Be Amended?

to court procedures, including the jury system, is the end, what about a nice quiet, quiet-title suit? No distractions there.

It is submitted that this is not the time to relax the principle of Canon 35. No constitutional rights have been infringed or denied. We have the evidence of experts on both sides of the controversy that photography and broadcasting do affect their subjects, do affect public opinion, and do affect the results of trials. The question of the right of privacy of

parties, witnesses and court officials has not yet been resolved, except possibly by one lower court opinion.²⁷

It is likewise submitted that in view of these facts, judges who do permit photography and broadcasting during trials do so at the risk of impairing the proper administration of justice.

In conclusion, the writer wishes to acknowledge his indebtedness to the following, among others, from whose

writings and speeches he has liberally borrowed: Judge Harold R. Medina, of New York; Judge Philbrick McCoy, of California; Judge Florence Allen, of Ohio; Judge George H. Boldt, of Washington; William T. Gossett, of Michigan; Glenn R. Winters, of Illinois; Edwin M. Otterbourg, of New York; and Wayland B. Cedarquist, of Illinois.

27. *U.S. v. Kleinmann*, 107 F. Supp. 407 (1952), where the refusal of a witness to testify before the Kefauver Committee in the presence of cameras was held justified.

Stranger Picketing

(Continued from page 820)

ments;³⁷ it summarized its holding in the *Garner* case as "a state may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes." It also emphasized that its paragraph in the *Garner* decision that it is not only actions forbidden by the Taft-Hartley Act that state courts cannot enjoin, but also actions that are protected or condoned by that Act that cannot be enjoined by state courts.³⁸ And the Court further emphasized the

point by saying in *Weber*:

... even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the state was free to issue its injunction. If this conduct [of the union] does not fall within the prohibitions of Section 8 of the Taft-Hartley Act, it may fall within the protection of Section 7, as concerted activity for the purpose of "mutual aid or protection."³⁹

Fifteen years of litigation since the *Swing* case determined that state courts could not enjoin organizational or stranger picketing have resulted in the *Swing* doctrine in effect being placed on an enforce-or-

not basis as the state sees fit. But now in *Garner* and *Weber*, the federal board seems to have been given exclusive jurisdiction over this activity, thus again banning state court injunctions against such picketing.⁴⁰ Does this end state court injunctions or open the door to many more years of litigation?

The latter seems certain as the *Garner* case was decided three years ago and differing interpretations of it are being issued by state courts, while even the *Weber* case leaves difficult questions to be determined by further litigation.

37. *Allen Bradley Local v. WERB*, 315 U.S. 740, injunction based on mass picketing upheld. *International Union v. WERB*, 336 U.S. 245, recurrent work stoppages not protected by Taft-Hartley Act, and thus open to state control; *Algoma Plywood & Veneer Co. v. Wisconsin Employees Relations Board*, 336 U.S. 301, state allowed to forbid union shop clause, and *United Construction Workers v. Laburnum*, 347 U.S. 656, even though unfair labor practices were involved, state court action for damages allowed because Taft-Hartley Act has no provision for compensatory relief. And now in June, 1956, the Supreme Court held mass picketing to be within the state's jurisdiction although also within the Board's jurisdiction, *UAW v. WERB*, 76 S. Ct. 794.

38. The *Garner* paragraph quoted in *Weber* is: "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of

restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits.

39. This was re-emphasized recently (February, 1956) in the "piggy back" case, *Local No. 25 v. New York, New Haven, and H.R. Co.*, 76 S. Ct. 227, where the Supreme Court said: "As we noted earlier, respondent's amended complaint alleged violations of the Act. Whether the Act was violated or whether, as respondent now claims, it was not, is, of course, a question for the Board to determine. Even if petitioner's conduct is not pro-

hibited by Section 8 of the Act, it may come within the protection of Section 7, in which case the state was not free to enjoin the conduct." And the Supreme Court quoted with approval its statement in the *Weber* case as follows: "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

40. Also see *United Mine Workers v. Arkansas Oak Flooring Company*, 76 S. Ct. 559, where in April, 1956, the Supreme Court again held that a State may not prohibit peaceful picketing in a case affecting interstate commerce because a "state may not prohibit the exercise of rights which the federal Acts protected", citing *Weber* and *Garner*.

There are two obvious questions left which will open the door for many years to further litigation on stranger picketing. The first of these is—which forum, state court or federal labor board, determines whether the Taft-Hartley Act prohibits or condones stranger picketing. For instance, in Ohio, in the *Grimes & Hauer* case,⁴¹ the injunction against picketing was dissolved by the Supreme Court of Ohio on the basis of the precedent of the *Garner* case, the court saying that the facts show "a question of unfair labor practices." Thus, there must be further litigation in Ohio to determine "the question of unfair labor practices". What if the Labor Board dismisses the charges? Does this mean that under *Weber*, picketing is "protected activity?"⁴² What if an Ohio court holds that the picketing violates the Taft-Hartley Act? And then the Labor Board later determines otherwise?⁴³ Or are all stranger picketing of interstate firms within the Labor Board jurisdiction and completely without the jurisdiction of state courts? These questions are all being litigated.

In Wisconsin, the Supreme Court, on facts showing that the picketing of a store was for the purpose of influencing prospective customers not to purchase a certain brand of stockings because the union had a quarrel with the manufacturer of such products, held this "product picketing" was clearly not banned by the Taft-Hartley Act, nor by any Labor Board decision, and, therefore, the court said the *Garner* decision gave it leeway to hold that the state courts could and should ban such picketing.⁴⁴

In Louisiana, the Supreme Court

held as *Weber* indicated that the state courts cannot enjoin picketing for a union shop, even though a union shop contract violates a state right-to-work law, the court saying that union shop situations are specifically covered in the Taft-Hartley Act and only federal law can govern.⁴⁵

In Kentucky, the Supreme Court held that a lower court, which had permanently enjoined the union from picketing the premises of an employer on the ground that picketing was being conducted for the unlawful purpose of coercing the employer to compel his employees to become members of the picketing union, had the "right and duty to vacate the permanent injunction" because "the *Garner* case removed the power to issue an injunction on that ground."⁴⁶

Thus, where the violation of Taft-Hartley is clear, the state courts are refusing injunctions. Where a violation is not clear or after the Board refuses to ban the picketing on the ground that no unfair labor practices were committed, the courts so far are refusing to intercede.

For instance, in Delaware, peaceful organizational picketing of an interstate employer was held to be solely a matter for the Labor Board, even though purposes other than organizing were found.⁴⁷

While in Louisiana, an interstate employer, faced with picketing by a union seeking a contract covering one truck driver, was refused Labor Board election since one worker is not a proper bargaining unit, and was refused Labor Board relief from the picketing, since there was no violation of the Taft-Hartley Act. He then asked a state court to en-

join the union, but was told the matter was one solely for the Labor Board. The state supreme court has affirmed this ruling.⁴⁸

And in a case involving picketing of the same type, the California Supreme Court said a state court could not act merely because the Labor Board had dismissed an election petition for lack of representation claims by unions.⁴⁹

The Michigan Supreme Court agreed with the ruling in the above case when it said jurisdiction was not conferred upon a state court by a Labor Board regional director's refusing to issue a complaint because a dispute did not violate the Taft-Hartley Act.⁵⁰

So, to this date, when the purpose of the picketing raises a question of unfair labor practices, the state courts are granting that the Labor Board has exclusive jurisdiction.

The second question left completely undetermined by the federal Supreme Court line of decisions on the pre-emption question was,—which forum, the Labor Board or the state courts—should decide whether a firm is in interstate as contrasted with intrastate commerce. This is an important problem as it decides whether state policy or the Taft-Hartley Act is the controlling factor in these cases and here again the subject is wide open for litigation. Years ago in *NLRB v. Fainblatt*,⁵¹ the Supreme Court held that where any amount of goods crossed the state lines, whether directly or indirectly, interstate commerce is affected and the Board has jurisdiction. But, the Board itself has for a long time determined its own jurisdictional standards on a much more

41. 163 O.S. 372.

42. The Labor Board itself has not issued a decision on this except that in 1948, it upheld a trial examiner who ruled stranger picketing, where a union shop had been requested, was not an unfair labor practice. *Local 74, United Brotherhood of Carpenters*, 80 NLRB 533. In administrative decisions since then, including one in 1955, the General Counsel of the Board has refused to issue complaints against such picketing. See *Administrative Decisions*, Case No. 739, Case No. 1069, Case No. 1132, as typical.

43. For instance, the 8th Federal Court of Appeals held that the state court has jurisdiction to enjoin unless the NLRB accepts jurisdiction. *Swift & Company v. NLRB*, 30 L.C. 69,929.

44. *Milwaukee Boston Stores v. American Federation of Hosiery Workers*, 69 N.W. 2d 762.

45. *Gulf Shipside Corp. v. Manny Moore*, 27 L.C. 69,101. In *Missouri*, the Supreme Court on a writ of mandamus directed a lower court to dissolve a non-appealable restraining order on the ground that interstate commerce was involved and the lower court was "failing to fulfill its legal obligation to respect the NLRB's exclusive jurisdiction". *Meatcutters & Butcher Workmen v. Johnson*, 286 F. 2d 182. See also *Kansas Supreme Court holding, Kaw Paving Co. v. Engineers Local 101*, 290 P. 2d 110 for the same result and with exhaustive list of like holdings.

46. *National Electric Service Corp. v. District 50 United Mine Workers of America*, 297 S. W. 2d 808. See also *Texas Construction Co.*

v. Hoisting & Portable Engineers Local, 286 P. 2d 160, where Supreme Court of Kansas in ordering injunction to be dissolved on basis of *Garner*, made the findings that the Labor Board had jurisdiction and the Taft-Hartley Act prohibited the picketing.

47. *Avon Products Inc. v. Highway Truck Drivers*, Del. Chan. Ct., 118 A. 2d 476.

48. *Mississippi Valley Electric Co. v. Teamsters Local 370*, La. Sup. Ct., 85 So. 2d 22.

49. *Benton Inc. v. Painters Local Union No. 333*, 291 P. 2d 13.

50. *Holman v. Industrial Stamping & Manufacturing Co.*, 74 N.W. 2d 322. See also *Graybar Electric Company v. AIE Union Local 618*, 287 S. W. 2d 794, a like decision by Missouri's Supreme Court in February, 1956.

51. 306 U.S. 601.

restrictive basis than allowed in *Fainblatt*. And the Board can always change those standards as it did during 1954. Therefore, litigation is required as to whether the *Fainblatt* doctrine of interstate commerce or the Board's own changeable jurisdictional standards are the ones which would give or take away the state court's jurisdiction to issue injunctions in these matters.

In Texas, a court of appeals took judicial notice of the Board's jurisdictional standards and said that any picketing of an employer not meeting those standards can be enjoined by state courts,⁵² and the Texas Supreme Court upheld a picketing ban after the Labor Board informally ruled it would not take jurisdiction.⁵³

In New York, the Supreme Court, Appellate Division, had before it a situation where it was not clear from the Labor Board's prior decisions whether it would or would not take jurisdiction over a local taxi company. The court said that inasmuch as the situation was not clearly defined, it would hold that the courts should not enjoin.⁵⁴

In Michigan, the courts are in conflict. An appellate court in the *Satin* case,⁵⁵ held that if, under the Board's published policy, it would not take jurisdiction, the state courts could enjoin and in that case, it did. However, another Michigan appellate court, in the *Universal Car* case,⁵⁶ held otherwise when it was presented with facts showing

that under former standards, the Labor Board accepted jurisdiction over retail car dealers, but by current standards declines jurisdiction over such dealers. This Michigan court, in this case, faced stranger picketing of a car dealer and held that the Board had jurisdiction whether it accepted it or not and that the state court, therefore, cannot enjoin even though such stranger picketing was against the public policy of the state. Soon afterwards, the Court of Appeals for the Tenth Circuit, took the same position as the Michigan court in the *Universal Car* case, citing with approval the Michigan Court's statement that jurisdiction must be based on "actual jurisdiction" of the Board, not on "day to day, or month to month, discretionary exercise of jurisdiction by the Board." The Tenth Circuit further held that where the Labor Board has jurisdiction, such jurisdiction cannot be vested or re-vested in a state court by the Board's refusal to act. It can only be done by the Board's formally ceding jurisdiction pursuant to the requisite provision of the Taft-Hartley Act.⁵⁷ But in California, the Supreme Court held that after the Board declines jurisdiction on commerce grounds, state courts may enjoin.⁵⁸

Thus, two difficult problems are left open for litigation under the *Garner* and *Weber* decisions. One— which forum, state court or Labor Board, determines whether the Taft-

Hartley Act prohibits or condones stranger picketing, and, two—which of these forums decides whether a firm is in inter- or intrastate commerce, and other litigious problems are appearing.⁵⁹ And this litigation concerns only the cases where at least a question of interstate commerce is involved as *Garner* and *Weber* only apply in that field. For no matter how wide or how narrow the Labor Board's jurisdiction is finally determined to be there remains the field excluded from the Board's jurisdiction under such ultimate determination and in this entire field of intrastate commerce, the litigation must continue to determine whether, by asserting "public policy" to be against stranger picketing, (whether to "organize" or to obtain a contract, or to advertise) state legislatures and courts can render innocuous, with the acquiescence of the Supreme Court itself, the rights granted unions by the Supreme Court decisions in *Thornhill v. Alabama*; *Carlson v. California*; *AFL v. Swing and Cafeteria Employees Union v. Angelos*.⁶⁰

So the litigation on stranger picketing, thought ended by *Swing*, in 1941, continues on and on. Whether it will ever end at this point seems doubtful because, as the Supreme Court pointed out in the *Weber* case, "this penumbral area can be rendered progressively clear only by the course of litigation". Pity the lawyer who must explain this to clients.

52. *Dallas General Drivers v. Jax Beer Co.*, 276 S.W. 2d 384.

53. *Cain, Brogden & Cain v. Teamsters*, 285 S.W. 2d 942.

54. *State Labor Board v. Wags Transportation Company*, 26 L.C. 68,754.

55. *Satin Inc. v. Local 445*, 26 L.C. 69,508.

56. *Universal Car & Service Co. v. IAM*, 27 L.C. 68,825.

57. *Retail Clerks v. Your Food Stores*, 225 F. 2d 659. See also *Food Basket Inc. v. Amalgamated Meat Cutters*, Kentucky Circuit Ct. 29 L.C. 69,561.

58. *Garman v. San Diego Building Trades Council*, 291 P. 2d 1. Cert. granted May 7, 1956, by U.S. Supreme Court and Solicitor General asked to file brief for NLRB and this case was bracketed with *Amalgamated Meat Cutters Union v. Fairlawn Meats*, 99 O.A. 517, where Ohio Court granted an injunction on the ground the Labor Board, under present standards, would not accept jurisdiction.

59. For instance, the Louisiana Supreme Court in June, 1955, in *Arkansas Oak Flooring Co. v. United Mine Workers*, 28 L.C. 69,386 Rev. and rem. by U.S. Supreme Court (76 S. Ct. 559); see footnote 40 held peaceful picketing for recognition by a union to be illegal

when the union was not in compliance with the portion of the Taft-Hartley Act requiring non-Communist affidavits to be filed by union officers. This Court reasoned that the employer was under no duty by law to recognize such a union which could not use Labor Board procedure to be certified. That, therefore, the Labor Board could not have jurisdiction as in the *Garner* case and, thus, the union was using "unlawful" means and could be enjoined. Apparently "unlawful" here is used in a sense of not being specifically lawful. For another of these cases tending to hold picketing *per se* illegal, see *Morgan Mill Work Company v. Highway Truck Drivers*, 115 A. 2d 709, where a New Jersey Chancery Court held that picketing was illegal unless the union had a "meritorious defense". The union's defense was that the company had committed unfair labor practices so the court postponed the injunction hearing to enable the union to file unfair labor practice charges against the company with the Board. Later the Company showed the Court that the Labor Board had dismissed the charges "for want of sufficient evidence" and the Court then issued a permanent injunction against the picketing.

These courts in affirming stranger picketing to be *per se* illegal have completely turned the coin and are, it seems, simply ignoring entirely the theory behind the decisions of *Thornhill*, *Carlson*, and *Cafeteria Employees Union*, that the "means" or "purpose" must be illegal for state courts to ban stranger picketing.

60. In Illinois, a union contemplating picketing a company wrote the company a letter stating that it did not wish to sign a contract with the company and it did not wish to organize the company's employees, that it was going to picket solely to advertise the establishment's non-unionism to the public. The Illinois Appellate Court, when the case came before it, (*Simmons v. Retail Clerks*, 125 N.E. 2d 700) held that the union's letter proved its purpose to be picketing for advertisement only and, that, therefore, it was not enjoined, under Illinois state policy against picketing for recognition or a contract. To the same effect, see *Graybar Electric* case, cited footnote 50, when similar letter proved "purpose". However the Union letter in *Graybar* stated it was picketing "to organize" by convincing employees that the public preferred to patronize union establishments.

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writings of Charles Dickens—fiction-entertainment—have often been credited with the reform of judicial administration in England; when the laymen of that country, frustrated and disillusioned by the inaction of judges and lawyers, proceeded, themselves, to secure the necessary legislative reforms.

Broadcasting . . . An Information Medium

But it is not necessary to rely upon the applicable law, as heretofore stated, to meet the argument. Broadcasting is not only an entertainment medium, but a news and information medium in every sense. It brings to the people newscasts, religious services, sports, public events, financial news, news of labor and business, political discussions, education, comedy, advertising, drama and many other special features. In all these respects broadcasting shares, and serves, a common public interest with the press and does it so well and so entertainingly that there are over thirty-seven hundred radio and television stations in this country bringing programs to over one hundred thirty million receiving sets in use by the people of the United States.

Hundreds of broadcasting stations are co-operating with educational institutions in preparing and distributing programs which supplement

the formal classroom and laboratory exercises. Successful teachers know that effective education must contain elements of entertainment which whet the imagination and satisfy the curiosity of students. The best hope for greater understanding of government by our people, and more intelligent participation therein by them, lies in the still wider use of broadcasting.

Another legal argument in support of Canon 35 is based upon the assumed violation of the "right of privacy" of participants in the trial. Some statements upon the subject assume a constitutional basis for such a right. To the extent that the Fourth Amendment bars the use, in federal courts, of evidence obtained by means of illegal search and seizure, and to the extent that the Fifth Amendment protects a person from being compelled to be a witness against himself, a measure of privacy is insured to an accused person. However, the full extent of that protection is that, upon proper objection made to evidence offered, it will be excluded if it was illegally obtained; and that, if the witness declines to answer a question which would force him to be a witness against himself, he will not be required to answer. Obviously, neither of these provisions prevents the bringing of the person to trial or the reporting of court proceedings which attend such a trial.

The argument that a right of privacy derives from the due process clause has also been rejected by the Supreme Court. (*Public Utilities Commission v. Pollak*, 343 U.S. 451, 461, 464-5. Cf. *American Communications Assn. v. Douds*, 339 U.S. 382, 401) Although the due process clause reaches back into the common law for definition, as to its meaning and its scope, it avails nothing in the present controversy, be-

cause the right of privacy, as here contended for was unknown to the common law. (*Elmhurst v. Pearson et al.*, 153 F. 2d 467, *Sidis v. F-R Pub. Corporation*, 113 F. 2d 806, 809, *Donahue v. Warner Bros. Pictures*, 194 F. 2d 6, 11-12.) Instead it is a thing of comparatively recent origin (*Warren and Brandeis, The Right to Privacy*, 4 HARVARD LAW REVIEW 193) which depends upon one of three bases, breach of contract, breach of trust, or constitutional or statutory enactment. It is not necessary to analyze or annotate these three bases because under whichever one is followed in a given state, there is no right of privacy in the case of a person who becomes the subject of a legitimate news event, portrayed by one of the media of public information, whether that person be a willing or unwilling participant in the event. This is particularly true of a public event, and even more especially of a public governmental proceeding. In California, where the right of privacy is recognized to some extent, the Supreme Court of that State has held that freedom of expression applies with equal force to news publications and entertainment features, and that the right of privacy, in the sense of being protected from undesired publicity is not absolute, but must be balanced against the public interest in the dissemination of news and information, consistent with the democratic processes under Article I, Section 9 of the California Constitution guaranteeing freedom of speech and of the press; and that the right of privacy may not be extended to prohibit any publication of matter which may be of public or general interest. (*Gill v. Hearst Pub. Co.*, 1953, 40 Cal. 2d 224, 253, P. 2d 441)

In a recent United States Court of Appeals case, interpreting a Utah statute in its application to a motion picture, the Court stated: "If the

statute undertook to restrict or forbid the publication of matters educational or informative or strictly biographical in character, or the dissemination of news in the form of a newsreel or otherwise, it would be open to challenge on the ground of objectionable restraint upon the freedom of speech and press." *Dona-hue v. Warner Bros. Pictures*, 194 F. 2d 6, 13. In the recent case of *Elmhurst v. Pearson*, 153 F. 2d 467, decided by the United States Court of Appeals for the District of Columbia Circuit, it was held that a radio news commentator was privileged to discuss the private life of a person on trial as a defendant in a criminal case; that the defendant's misfortune in being a defendant in such a case made him the object of legitimate public interest and destroyed any right on his part "to be let alone".

Perhaps the confusion which has persuaded some authors to make this "right of privacy" argument results from the fact that the use of pictures is involved in both television and news photography—although this would not explain objection to radio. In any event, the preceding analysis of the subject is equally applicable here. A careful search of the authorities has failed to reveal a single case which has applied the right of privacy concept to the communication of news concerning a public trial, by means of photography or otherwise.

A Public Trial . . . A Personal or Public Right?

Another favorite argument in support of Canon 35 is that, because the right of a defendant in a criminal case to a public trial is guaranteed by the Sixth Amendment, the right has no existence otherwise in either civil or criminal cases; that it is a right exclusively of the defendant and not of the public; that it may be waived by the defendant, in which case the public can be excluded from the trial; that, if the defendant elects to have a public trial, the judge may control the admission or exclusion of persons from the courtroom in his absolute discretion. This argument

cannot stand up under analysis.

Although the Sixth Amendment does guarantee to an accused person in a federal court, the right to a public trial, that is not, by any means, all the law upon the subject. The Ninth Amendment provides, "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." One of the most precious rights of the people is that of public trials; a right which has been recognized by the common law since the demise of Star Chamber.¹ The explanation given by such authorities as Blackstone, Bentham, and later Wigmore, for turning the light on court proceedings revealed concern for the public interest even more than for the interest of an accused in a criminal case.

These authorities explained that the public interest required that the people should see and hear court proceedings in order that they might know how the participants—including the judges—behaved themselves, thus learning about their government and acquiring confidence in their judicial remedies; that it was in the public interest—in all classes of cases—that the witnesses should give their testimony in public, in order that key witnesses, unknown to the parties, might be induced thereby voluntarily to come forward and give important testimony; that witnesses, knowing they were subject to the attention and scrutiny of the public at large, would be more apt to tell the truth. There was no intention of preventing accused persons or witnesses from being "distracted" by such scrutiny. On the contrary, it was highly desirable that they should be aware that the world at large—limited in those days by the capacity of the courtroom—was watching them and checking the truth or falsity of their testimony. (3 BLACKSTONE COMMENTARIES, Ch. 22, Sec. 496 *373; BENTHAM, RATIONALE OF JUDICIAL EVIDENCE B.II, Ch. X (1827); 6 WIGMORE ON EVIDENCE, 3d Ed. (1940) Sec. 1834; Cf. *Re Oliver*, 333 U.S. 257, 270, 286, 92 L. ed. 682, 692; 3 STORY, CONST. 1785).

When the Sixth Amendment was written, it picked up *only one* of the reasons for public trials and specified that the accused should benefit therefrom. There was no intention to deny other benefits or other rights and, no doubt, when some members of the Convention called attention to the maxim of legislative interpretation *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of another—the delegates were careful to avoid such an interpretation, by writing the Ninth Amendment.

Attorneys for accused persons have been zealous in urging the right of public trial, in their behalf. Judges have been solicitous of the rights of defendants and many decisions have been written in interpretation of the Sixth Amendment. As too frequently happens, the rights of the people, generally, are not presented to the courts. Perhaps this is the reason why there are so few reported cases, which define or explain the right of the people that trials in their courts shall be public. Perhaps the reason is to be found in the general assumption—upon the part of lawyers and judges familiar with the common law—that this right of the people, and the reasons for it, are so well understood as to make such definition or explanation unnecessary.

Fortunately there is a comparatively recent decision of the Supreme Court of the United States which states the right of the people bluntly and succinctly. In *Craig v. Harney*, 331 U.S. 367, 374, the Court said: "A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government to suppress, edit or censor

1. *Re Oliver*, 333 U.S. 257, 266, footnote 21: "The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who praised the publicity of the common law courts. . . . The English common law courts which succeeded to the jurisdiction of the ecclesiastical courts have renounced all claim to hold secret sessions in cases formerly within the ecclesiastical jurisdiction even in civil suits. See *Scott v. Scott* (1913), A.C. (Eng.) 417 Ann. Cas. 1913 E 614-H.L."

events which transpire in proceedings before it." The right of the people in this respect was recognized more recently in the opinion of Mr. Justice Frankfurter, in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920: "One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right." What a travesty it would be if accused persons had power, by virtue of the Sixth Amendment—perhaps with the connivance of pliant judges—to close the courts of the people by waiving public trials; thus preventing them from judging "whether our system of criminal justice is fair and right." Recognizing these dangers, the Court of Appeals of Ohio recently allowed a writ of prohibition to prevent enforcement of an order excluding the public from a criminal trial; stating that while the defendant could waive his constitutional right to a public trial, and had done so, he could not waive the right of the people to insist upon a public trial. (*E. W. Scripps Co. v. Fulton*, Ohio App. 125 N.E. 2d 896).

In summary, the effect of the argument, thus made in support of Canon 35, would be that the Sixth Amendment not only guaranteed to accused persons the right of public trial, but, also, abolished the corresponding right of the people; thus giving to the Sixth Amendment status superior to the Ninth and Fourteenth. At this point, obviously, the argument reduces itself to an absurdity. Presumably, no one would openly support such a proposition. There are many rights not found in the first eight Amendments—or in the original Constitution itself—which are recognized daily in our courts. The well-known right of self-defense is a good example. Ironically, another is the very right of privacy which has been projected as an argument in favor of Canon 35.

It is significant, in this connection, that the Supreme Court established the right of an accused person to a

public trial in a state court, not upon the authority of the Sixth Amendment, but rather of the due process clause of the Fourteenth Amendment, which in turn looked to the common law and to the historically universal practice in the United States. (*Re Oliver*, 333 U.S. 257).

In *Wolf v. Colorado*, 338 U.S. 25, 27, the Supreme Court said that due process "is the compendious expression of all those rights which the courts must enforce because they are basic to our free society." In *Powell v. Alabama*, 287 U.S. 45—as well as in a number of later cases—the Supreme Court has upheld the right of an accused to the benefit of counsel in state courts not because of the Sixth Amendment, but because under the due process clause of the Fourteenth Amendment "the right involved is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions".

It would be hard to find language more appropriate to describe the right of the people to see and hear, and know, what goes on in their courts, than "those fundamental principles of liberty and justice which lie at the base of all civil and political institutions" and "which the courts must enforce because they are basic to our free society". The broadcasters respectfully contend that the best and most effective way to let the public know what goes on in courts is by radio and television broadcasting.

A similar argument is made with respect to civil cases where, it is said, there should be no requirement of public trial, on the theory that the controversy is solely one of private interest, between private individuals, concerning their private affairs. This point is covered also by the authorities previously cited to show the common law and practice with respect to public trials and their incorporation into the law of this country through the due process clause of

the Fifth and Fourteenth Amendments.

Of equal importance perhaps is this disturbing revelation of failure to comprehend the nature of our Government. The idea that the court when trying a civil case is a sort of country club—to which only the privileged members of the licensed Bar can come and bring their clients—completely repudiates the fundamental concept of the court as one of the three branches of government, a branch of the government which is intended for the service of all the people, which is supported by the taxes paid by all the people, which is presided over by judges elected by the people, in buildings erected upon public land, from public funds, whose supporting personnel is paid from public funds, and to which other persons not necessarily privy to the affairs of the litigants may be required to come as jurors or as witnesses, upon subpoenas issued by the court, to help solve the so-called private controversies.

The argument was answered by the Supreme Court in *Craig v. Harney*, previously cited. But it is well for us to keep always in mind the much sharper injunction of Chief Justice Stone, in *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 318-319, where he said:

... a trial in court is never, as respondents in their brief argue this one was "purely a private controversy . . . of no importance to the public." The State whose interest it is the duty of the court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted. . . . The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right[s]. . . . The occasion seems appropriate to remind counsel that the attempted presentation of cases without adequate preparation, and with want of fairness and candor, discredits the bar and obstructs the administration of justice.

A non-legal argument, closely related to the one previously dissected, is that the desire to broadcast public trials is motivated, merely, by a desire to satisfy "the morbid curiosity of idle, vulgar people". No doubt

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the same argument was made when the abolition of Star Chamber was being debated; and much more easily rationalized in those days because Star Chamber was peculiarly and particularly the King's court. Presumably, this point of view will continue to find expression by a few lawyers and judges, even though the hope of restoring a monarchy or other autocratic form of government might not find open advocacy.

In response to this argument, the broadcasters find themselves playing the traditional role of the free press in insisting and explaining that in this country the courts belong to the people; that under our democratic concept of a republican form of government, the people must be continually informed about the functioning of our courts as well as the other branches of government. It is highly inconsistent to complain of the ignorance and apathy of voters; then, deliberately to close the sources of information; thus making it impossible for them to see and know. We should be grateful for any evidence of curiosity upon the part of our people concerning the operations of government. Particularly, this would seem to be true of lawyers and judges who work so laboriously to enlist the interest and efforts of laymen in improving the administration of justice.

Trials Should Be Public . . . A Clear Mandate of the Law

The position of the broadcasters with respect to the foregoing arguments is that in view of the clear mandate of the law, the trial of all cases, criminal and civil, should be public; except for special cases, or parts of particular cases where the welfare of children or other such considerations may be involved. Broadcasters recognize that large discretion must be vested in and exercised by the trial judge, in order to insure orderly procedure in the courtroom and to exclude any offender who will not respect the constitutional mandate of due process, which requires such orderly procedure.

The broadcasters contend that

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whenever a trial is public, they have as much right to be present and report the news thereof as any other medium of communication. They have expressed their willingness—when the question has been raised—to enter into pooling agreements which make it unnecessary to bring excessive equipment into the courtroom; and, in other ways to abide by “ground rules” imposed by the trial judge in advance of the trial.

Broadcasters do not disparage in any way the other media of communication. Instead, they insist that all the media have an equal right to be present and to report—each in its own way—the proceedings of the court; provided they comply with instructions of the trial judge as to the “ground rules” necessary to insure an orderly procedure. The as yet unreported opinion of the Supreme Court of Colorado, following a recent six-day hearing in Denver, established, conclusively, that radio and television broadcasting, news photography, newsreels, can all be so conducted as not to interfere with the dignity of the Court or disturb its decorum in the least. It is significant that in the Court's opinion appears the statement, “. . . the vast majority of those supporting Canon 35 have failed, neglected or refused to expose themselves to the information, evidence and demonstrations of progress which are available in this field.”

But, although broadcasters insist upon the rights of all media with respect to public trials, nevertheless they do contend that they can report such proceedings more completely, more accurately and more objectively than any other medium. This brings us to consideration of another curious argument which is sometimes made in support of Canon 35, i.e., that the whole trial would not be broadcast, hence that

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it would be unfair to permit the broadcasting of any part of it. The argument seems incongruous on its face—in view of the fact that no other form of reporting court proceedings, except the official transcript, purports to be complete. But let us assume that the argument is presented in good faith and consider it on its merits.

First then, concerning the reporting of the whole case; what possible good could be accomplished by broadcasting to the people the tedious rituals of objections and exceptions; the arguments on admissibility of evidence or the qualifications of a witness; the personal clashes between attorneys and other such time-consuming and frequently dilatory happenings; except perhaps to let the people see how the time of the court is squandered. Only on their theory could the language of Canon 35 be justified, that to broadcast a trial would “degrade the court”. It could not “create misconceptions with respect thereto” because it would do nothing but give a completely faithful picture of what goes on.

Consider the nature of reporting which takes place, customarily, concerning court procedure; and first, the reporting done by the typical member of a courtroom audience. He is, of course, usually untrained in the law—substantive or procedural—and unfamiliar with the techniques of selecting, editing and transmitting news. He sits through portions of the trial; he reports what he sees and hears. This is conditioned by his own inexperience; much of what he sees and hears is interrupted by the physical activities which go on in the courtroom and by the whispered conversation

of his friends. When he leaves the courtroom, he tells his relatives, friends, and any others who will listen to him what he *thinks* has been going on in the courtroom. To say that such reporting is bound to be superficial is merely to emphasize the obvious. Such reporting will probably be done largely in terms of what individuals looked like, how important particular lawyers were, how complicated the whole business seemed to be. Can it be supposed that any completely adequate interpretation of the administration of justice could result from this source?

Consider the reporting done by the press. Here we get more or less skilled observers, usually working against deadlines, in and out of the courtroom, frequently missing the significance of particular evidence, or, even more probably, failing to understand the rulings of the court. As was said by the Supreme Court in *Craig v. Harney*, *supra* (page 374), concerning publications alleged to be contemptuous:

The articles . . . were partial reports of what transpired at the trial. They did not reflect good reporting, for they failed to reveal the precise issue before the Judge. . . . In that sense the news articles were by any standard an unfair report of what transpired. But inaccuracies in reporting are commonplace. *Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the Judge who sat on the case.*

Where court proceedings are photographed—unless for television or newsreels—they can be no more than “still shots” of particular participants, or of the courtroom scene, frequently of the “candid camera” variety which emphasize, out of all proportion, idiosyncracies of the persons photographed. When a case is “covered” by specialists, looking for “human interest”—as is true of the “sob-sister” approach—the result cannot fail to be a distorted, over-emphasized presentation which usually misses, completely, the merits of the case.



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Now, with the foregoing considerations in mind, compare what happens when proceedings are broadcast. To the extent that any broadcasting takes place it will be an *accurate, faithful* presentation of what goes on in the courtroom. To the extent that any part of a trial is televised the picturization will be in proper perspective; it will show, to the outside public, exactly what each participant looks like; how he acts; his changing expressions; the reactions of the jury, of the witnesses; the sincerity or falsity of advocacy. In this connection, it is pertinent to remember the old Chinese maxim: One picture is worth ten thousand words.

One of the best established principles of appellate procedure is that a determination made by a judge during the trial will not be disturbed—except for obvious error of law—because the trial judge was in a position to see the witness and judge the forthrightness of his testimony, to observe the jury; to note the conduct of counsel, to determine the reactions of each toward the other. And this principle obtains even though men of long experience in court work are well aware that a trial judge can, himself, by the various devices of voice, speech, emphasis in making a ruling, or by studied pause or hurried reading of an instruction to the jury, convey widely varied meanings; while the record, in cold print, may convey but one certain meaning.

The report of the Special Committee of the American Bar Association in 1937 contained this significant statement:

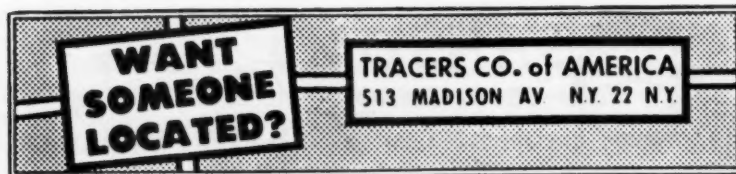
There is entire unanimity among the members of this joint committee in believing that judges like other public officers must expect to have their conduct subjected to the freest criticism. Good judges welcome such criticism and slothful and incompe-

tent judges should have it, whether they welcome it or not. [858].

The important question is how best to reveal such conduct as a basis for fair criticism. We believe that broadcasting—especially television—is much better adapted to that end, than any other medium.

This brings us to another argument, usually made orally, but which seems to be very persuasive to lawyers and judges, *i.e.*, that, assuming broadcasting of court proceedings, trial judges—hungry for publicity—will permit the use of their courtrooms for the purpose of aggrandizing themselves. This, of course, is one of those difficult problems of public office which is hard to answer in general terms. We recognize that in jurisdictions where judges are required to go to the electorate every so often for a continuance in office—and considering the relative difficulty which judges have of campaigning, compared with candidates for other offices—opportunities for publicity sometimes are eagerly sought. That some of this is entirely legitimate cannot be denied. That some highly reputed judges indulge in such publicity is equally apparent. The popular, witty speaker, the affable participant in bar association meetings, the contributor to worthwhile civic activities, sometimes goes faster and farther ahead than do other members of the Bench whose major qualification is the performance of their judicial duties and whose selection for higher office would perhaps much better serve the administration of justice.

In any event, the solution of this problem does not lie in arbitrarily forbidding all broadcasting of trials. If, as the Colorado Supreme Court pointed out, a judge is of the “show-off or strutter” type the remedy eventually lies in the hands of the people. There is good evidence to indicate



that the judge and other trial participants behave themselves better when proceedings are broadcast than when they are not. The real question is: Should we let the people know or should we conceal the facts? If they do know, they can correct; and broadcasting affords—on a strictly comparative basis—the best possible method of letting them know.

Suppose, for example, that, upon the basis of pencil and paper reporting, an editorial commentator states that the judge in a particular case instructed the jury in a fair, unbiased, objective manner. Suppose that another editorial writer states—upon the basis of the same pencil and paper reporting—that the judge was biased, dictatorial and obviously prejudiced. How shall the people determine the question? Suppose that to support one editorial point of view a photograph of the judge is printed which reveals him in a campaign speech, violently condemning sin in all its phases; while to support the other point of view, a photograph is printed showing him in his most dignified judicial posture. What, then, shall the people conclude as to the way in which justice is administered?

Now compare the portrayal of a trial by radio or television broadcasting. There is an exact reproduction of what occurs; by way of action or speech. There are no posed pictures unless the participants are poseurs by nature; in which case the people at large see just what the audience in the courtroom sees. Broadcasting can bring to our people, in their homes, at convenient hours, news of what actually goes on in courtrooms and thus provide background and a guide for their intelligent reaction with respect to the administration of justice. Television broadcasts are particularly adapted for such educational pur-

poses. How many parents, harassed by present-day environmental conditions which make child-training so difficult, would welcome an opportunity for them to see and hear the solemn proceedings of a criminal court, demonstrating that "crime does not pay", or the way in which the problems of life are settled in courts of civil jurisdiction?

The people of this country should have a much better opportunity to see and know what is going on in their courts. Some of the most respected members of our profession have called attention to the continuing inadequacy of judicial administration, to the tremendous backlogs of cases in the courts and resulting delays in the disposition of causes. They have pointed out that the legislatures, both federal and state, have turned, increasingly during recent years, to the creation of administrative agencies and procedures where men untrained in law and unconcerned with constitutional limitations have established bureaucratic and autocratic controls of many areas; largely unrestrained by judicial review. They have warned us that in the United States it may happen, as it did in England, that the people will grow increasingly impatient with professional unwillingness to revise our concepts of judicial disposition, and through legislative action, even more drastically emasculate our present procedures. Indeed, the present hodgepodge of procedural rules and judicial organization which exists in many jurisdictions has resulted, largely, from legislative action. And the reluctance of the people to surrender legislative supervision of court organization and procedures is clearly indicative of the trend.

Nothing contributes more to the hostility of the people toward lawyers and judges than the impression

that the courts are either of a disgracefully inferior character where slapdash justice is administered to drunks, addicts and traffic violators, or if of the superior or appellate variety, then that they function in a quasi-ecclesiastical setting where medieval procedural mysteries are performed and from which the people are excluded, except on the rare occasions when they appear as humble suppliants or as unwilling participants on subpoena or under indictment. Any evidence that the reason for preventing the people from seeing what goes on, because of fear that they may learn too much of the inadequacies of court procedure, will only intensify the hostility.

Now that broadcasting has come to be as much a household institution as the bathtub and the refrigerator, now that the people are privileged to enjoy coronations, inaugurations, Presidential news conferences, Cabinet meetings, national political conventions, great symphonic performances, religious services in the churches and cathedrals of the nation, the people are wondering just what there is so sacrosanct about a courtroom. If the magnificent isolation prescribed by Canon 35 is to be maintained, we will need a better reason for maintaining it than the Canon presently contains.

Some members of the Bench and Bar are aware of these facts, and during recent years increasing efforts have been made to woo the affections of the people by public relations campaigns, including motion picture and television portrayals. Too often these portrayals lack the entertainment features which are essential to effective education. Generally speaking, they are offset by the fact that people know they are being excluded from the real-life dramas enacted in the courtrooms, about which they read or hear at second hand. The best way, by far, of regaining their understanding, their respect and their support is the simple expedient of opening the courtroom doors to radio and television broadcasting.

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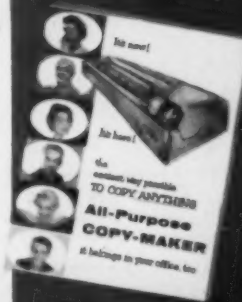
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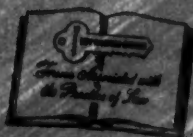
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